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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ALEXANDRIA, VIRGINIA

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May 1, 1987

QUESTIONS PRESENTED

1. Are the Fourteenth Amendment's guarantee of the due process of law, and the Sixth Amendment's guarantee of the effective assistance of counsel, violated when counsel, in the appeal from a capital conviction, fails to assert the undoubted falsity and unconstitutionality of crucial evidence on which his client's sentence of death rests?

2. Are the Fourteenth Amendment's guarantee of the due process of law, and the Sixth Amendment's guarantee of the effective assistance of counsel, violated when counsel, during the guilt phase of a capital trial, fails to object, rebut, or otherwise respond to the prosecutor's repeated assertions in closing argument that the defendant is a multiple murderer, when there is no record evidence to support those assertions?

3. Is the Sixth Amendment's guarantee of the right to confront and cross-examine witnesses violated when, at a resentencing hearing for a capital crime, the prosecution has actors read to the jury a transcript reflecting the adverse testimony of witnesses given at an earlier penalty phase, before a different jury, without demonstrating that those witnesses are unavailable to testify in person?

4. Is the Fourteenth Amendment's guarantee of the due process of law violated by the refusal of a state court trial judge to recuse himself from hearing a petition for a writ of habeas corpus when the petition's principal assertion is that a lawyer who had served as that judge's long-time courtroom clerk provided petitioner ineffective assistance during a capital proceeding?

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Wilbert Lee Evans petitions for a writ of certiorari to review the decision of the Circuit Court of Alexandria, Virginia, entered in this case.

OPINIONS BELOW

The Circuit Court of Alexandria, Virginia, per Judge Kent, dismissed by summary order, without hearing or opinion, most of the claims raised in Petitioner Evans' Petition for a Writ of Habeas Corpus. The court's order, which is unreported, is set forth in the Appendix ("App.") at 1a-2a. The court held an evidentiary hearing on three of Evans' claims in December 1985, and then dismissed them in a letter opinion issued on May 19, 1986 (App. 3a-13a), and an order issued on June 3, 1986. (App. 14a-15a). Evans timely appealed from both orders, and the Supreme Court of Virginia denied review, in a summary order issued on February 26, 1987. (App. 16a).

Evans' habeas corpus petition challenged his 1981 conviction of capital murder and death sentence. The Virginia Supreme Court had earlier upheld both the conviction and sentence in an opinion issued on December 4, 1981, *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981) (App. 17a-31a), and this Court denied review, 455 U.S. 1038 (1982) (*"Evans I"*). Thereafter, Petitioner's habeas counsel discovered, and the Commonwealth confessed, that the prosecution had knowingly and deliberately introduced false and unconstitutional evidence at Evans' capital sentencing, and that this same tainted evidence had been cited before the Virginia Supreme Court and this Court as the basis for affirming Evans' death sentence. *See Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984) (App. 32a-46a), *cert. denied*, 471 U.S. 1025 (1985) (*"Evans II"*). With the Commonwealth conceding that Evans' death sentence could not "be sustained" (App. 47a), the trial court vacated that sentence; over Evans' objections, a new sentencing hearing was held, and Evans was resentenced to death. The Virginia Supreme Court affirmed Evans' second death sentence, *Evans II*, 323 S.E.2d 114 (1984) (App. 32a), and this Court denied certiorari, over a lengthy dissenting opinion by Mr. Justices Marshall and Brennan, 471 U.S. 1025 (1985) (*"Evans II"*).

JURISDICTION

The Order of the Circuit Court of Alexandria, Virginia, denying Evans' Petition for a Writ of Habeas Corpus was entered on June 3, 1986. (App. 14a-15a). The Order of the Supreme Court of Virginia denying review of Petitioner's appeal was entered on February 26, 1987. (App. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth separately at the end of this volume.

STATEMENT OF THE CASE

Preliminary Statement

The stark fact of this case is that if Petitioner's court-appointed counsel had rendered effective assistance on appeal from the 1981 death sentence, Petitioner would not be facing the death penalty today. Petitioner Evans was sentenced to death on the basis of evidence which the Commonwealth of Virginia has acknowledged was known to have been false at the time of its introduction. The prosecuting attorney has since maintained under oath that during the penalty phase of Evans' trial, he alerted Evans' counsel to the infirmities in the Commonwealth's evidence, but that counsel failed to object to its use. Independent, unimpeachable evidence demonstrates that by the time Evans' sentence was imposed and throughout the course of his appeals, defense counsel knew or should have known that Petitioner's capital sentence rested on false evidence. Yet during the lengthy period following Evans' conviction and death sentence, defense counsel failed to correct the record or to challenge the tainted evidence, even as the Commonwealth was citing that evidence in successfully urging the Virginia Supreme Court to affirm Evans' death sentence, and this Court to deny review. The record also demonstrates that counsel's failure caused Evans lasting prejudice: if defense counsel had challenged the Commonwealth's tainted evidence at any time during the course of Evans' appeals, Evans' death sentence would necessarily have been vacated (as indeed it later was); and under Virginia law as it existed at the time, the Commonwealth would have been barred from seeking a second capital sentence.

This extraordinary confluence of events—involving admitted misconduct by the prosecutor, and demonstrable ineffectiveness by defense counsel—creates an opportunity for this Court to instruct the lower courts on the scope of the constitutional rights recently articulated by this

Court in *Evitts v. Lucey*, 469 U.S. 387 (1985). In addition, this case presents other important constitutional questions as to which the lower courts require guidance.

The constitutional errors raised in the instant petition occurred during Evans' trial and sentencing, first appeal, resentencing, and state habeas corpus proceeding, as discussed below.

The Guilt Phase of Evans' Trial

In January 1981 Petitioner Wilbert Evans was arrested, and later indicted, for capital murder[1] in the shooting death of Deputy Sheriff William Truesdale of the Alexandria, Virginia Sheriff's Department. The trial judge appointed as Evans' counsel two Virginia attorneys, Messrs. Brown and Long; they represented Evans at trial, and throughout his first appeal and certiorari petition.

The undisputed evidence at trial showed that in January 1981 Petitioner Evans was incarcerated in North Carolina, on charges unrelated to this proceeding. At the request of Virginia authorities, he was transferred to the City Jail, in Alexandria, Virginia, to testify as a witness at a hearing scheduled for January 27, 1981. Evans spent the night of January 26, 1981 at the Alexandria City Jail and appeared in court the next day. Following his court appearance, while Evans was being escorted back to jail by Deputy Sheriff William Truesdale, Evans seized Deputy Truesdale's service revolver and attempted to escape. A struggle ensued between Evans and Deputy Truesdale, and the weapon discharged, inflicting a wound from which the Deputy later died.

That Evans had shot Deputy Truesdale while attempting to escape was undisputed; Evans' trial focused in-

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[1] The Virginia Code defines capital murder as "the willful, deliberate and premeditated killing of a law-enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties." Virginia Code § 18.2-31(f) (1982).

stead on whether the shooting had been accompanied by the premeditation required to make the act capital murder under Virginia law. The prosecution's theory was that Evans had planned his escape attempt in advance and had intended, because of the length of prison time he believed he faced in North Carolina, to carry it out at all costs. To prove this, the prosecution introduced testimony from three inmates, including Washington and Jasper, who had been incarcerated with Evans on the night before the shooting. They testified that Evans had told them that he was facing life imprisonment in North Carolina and had "nothing to lose" by attempting to escape.[2] This inmate hearsay testimony was admitted with cautionary instructions from the court that the statements could not be considered "to prove whether or not [Evans] is facing a sentence in North Carolina or anything concerning his legal situation in the State of North Carolina." (App. 55a; *see id.* 53a).

Testifying in his own defense, Evans denied making such statements. He asserted that his escape attempt was unplanned, and that he had shot Deputy Truesdale accidentally while attempting to shoot off his handcuffs.[3]

In closing argument, the prosecutor emphasized Evans' supposed belief that he had "nothing to lose" in planning and carrying out an escape. In an apparent reference to the testimony of inmates Washington and Jasper, the prosecutor twice told the jury that Evans had said that

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[2] Ralph Washington, one of the inmates, testified that Evans had said that "he was already facing life and he ain't got nothing to lose. [Evans] said he was going to try any means possible to escape." (App. 53a). The other inmate, Anthony Jasper, testified that Evans had said "he ain't got nothing to lose . . . . [H]e had two life sentences, something like that." (App. 55a).

[3] In fact, with a second shot from Deputy Truesdale's weapon, Evans did successfully sever his handcuffs. He escaped on foot but, within minutes, was recaptured.

he had "killed people in North Carolina." [4] In fact there was no evidence before the jury that Evans previously had either killed anyone (for in fact, he had not) or had said that he had killed anyone, in North Carolina or elsewhere. Although the prosecutor's summation created the false impression that Evans was by his own admission a multiple murderer, Evans' counsel failed either to object to the summation, to seek a curative instruction from the court, or to offer rebuttal in closing argument. Thereafter, the jury found Evans guilty of capital murder.

Penalty Phase and Sentencing

The penalty phase of Evans' trial was strikingly short.[5] The Commonwealth presented one witness, Officer Pugh, and three documentary exhibits (Commonwealth Exhibits 19-21). Evans' defense counsel presented no evidence at all.[6]

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[4] The prosecutor stated:

> "We start out with motive. And why would Wilbert Evans come up here to escape and why would he go to the extent of killing someone to do it? Two witnesses said he had nothing to lose; he'd killed people in North Carolina; he'd absolutely nothing to lose. He was going to escape, no matter what. . . . He would go to any extent not to go back to North Carolina . . . ."

(App. 56a).

> "Did he have motive, bias? I'll tell you he had all the motive and bias; he's facing the death penalty. He told people he killed people and was facing life imprisonment in North Carolina."

(App. 56a).

[5] The entire proceeding, including a long bench conference, one recess, and jury argument, lasted 45 minutes.

[6] Although counsel's failure to present any evidence during the critical capital sentencing phase is not at issue here, that failure is illustrative of the quality of representation Evans received throughout from his court-appointed counsel.

The Commonwealth sought the death penalty on the basis of the statutory aggravating factor, that there was a "probability that [Evans] would commit criminal acts of violence that would constitute a continuing serious threat to society . . ." Virginia Code § 19.2-264.2(1) (1983). The heart of the prosecution's presentation was the three documentary exhibits purportedly reflecting Evans' prior conviction record. The exhibits showed convictions for seven criminal offenses, one of which was "[a]ssaulting a police officer with a knife while the officer was in the performance of his duties." (App. 47a). *See Evans I*, 284 S.E.2d at 820 (App. 24a). Defense counsel did not challenge the validity of any of the convictions listed in these exhibits, and they were admitted into evidence. The jury found the statutory aggravating factor of "future dangerousness" and voted, on April 17, 1981, to impose the death penalty. On that day the jury was dismissed.

The trial court imposed sentence on June 1, 1981. Before doing so, the court reviewed and received a presentence report prepared by the Commonwealth's Probation Department. (App. 57a-60a). Defense counsel acknowledged having received and read the report, and that they had "had sufficient time to review it." (App. 62a). The pre-sentence report showed that the most serious charge in Commonwealth Exhibit 21—"Assault on Officer/Affray with a Deadly Weapon"—had been *nolle prossed*. (*See* App. 58a). Despite this fact, defense counsel voiced no objection to the report, and in particular did not indicate that the report had altered the understanding of Exhibit 21 which counsel had had at the time of trial. After testimony by an officer from the Probation Department and argument by counsel, the trial judge imposed sentence of death.

Two years later, the Commonwealth confessed that Exhibits 19-21 were " 'seriously misleading' " and that it was constitutional error to have admitted them at the penalty phase of Evans' trial. (App. 48a). *See Evans*

II, 323 S.E.2d at 117 (App. 34a).[7] In an evidentiary hearing held on September 21, 1983, the original prosecutor, Mr. Kloch, testified that he had told Evans' counsel about some of the inaccuracies in Commonwealth Exhibits 19-21 immediately prior to closing arguments at the April 1981 sentencing proceeding. (App. 64a-72a). Kloch testified that Evans' counsel "just took [the disclosure of inaccuracies] as a matter of course . . . . There was no surprise or shock or anything of that nature." (App. 70a). According to Kloch, defense counsel said "[j]ust leave [the erroneous convictions] in there and we'll tell the jury about it." (App. 72a).[8] In fact, Evans' counsel neither told the jury about the inaccuracies in Commonwealth Exhibits 19-21, nor moved to strike the exhibits.

First Appeal

Represented by Messrs. Brown and Long, Evans took an automatic appeal as of right from his conviction and death sentence. Evans' brief to the Virginia Supreme

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[7] The most serious of the convictions depicted in the Commonwealth's Exhibits—"assaulting a police officer with a knife while the officer was in the performance of his duties"—was not a conviction at all but only reflected an indictment that had later been *nolle prossed*. Another "conviction" had been dismissed on appeal, and two others simply represented earlier and later stages of court proceedings relating to a single offense. Moreover, of the seven "convictions," no less than five had been obtained while Evans was without benefit of counsel, and thus could not lawfully have been used in a subsequent proceeding for any purpose, much less as the foundation for a death sentence. *See, e.g., Baldasar v. Illinois*, 446 U.S. 222 (1980). *See* Letter of Jerry Slonaker to the Honorable W.R. Wright, Jr., April 12, 1983 (App. 47a-50a); *Evans II*, 323 S.E.2d at 117, 120 (App. 34a-35a, 39a-40a); *Evans II*, 471 U.S. at 1026 (Marshall, J., dissenting from denial of certiorari).

[8] Although Evans' counsel denied knowledge of the flaws in Exhibits 19-21 (App. 74a, 78a), the Commonwealth has long urged that its prosecutor, Mr. Kloch, explicitly informed Evans' defense counsel of the errors in Exhibits 19-21, and that counsel failed to act on that information. *See* Commonwealth Brief in *Evans II*, Record No. 840474, at 4-5, 25-29 (filed July 6, 1984) (App. 80a-85a).

Court did not challenge the conviction records (Commonwealth Exhibits 19-21) proffered by the Commonwealth as the basis for Evans' death sentence. The Commonwealth's brief in opposition, filed on September 4, 1981, specifically recited Evans' purported convictions—including the charge of aggravated assault on a police officer that had actually been *nolle prossed*—to support the jury's finding of future dangerousness. (App. 87a-89a). The Supreme Court of Virginia, explicitly relying on several of the non-existent "convictions," affirmed Evans' death sentence in an opinion issued on December 4, 1981. *Evans I*, 284 S.E.2d at 820, 823-24. (App. 24a, 29a-31a).

Still represented by Brown and Long, Evans petitioned this Court for certiorari review. Again, Evans' petition failed to challenge the false conviction records. The Commonwealth opposed the petition, once again citing Evans' purported conviction records (App. 91a), which the Commonwealth's trial counsel later acknowledged were known to have been false. (App. 65a-67a). On March 22, 1982, this Court denied review. *Evans I*, 455 U.S. 1038 (1982).

The Patterson Decision

On October 16, 1981, while Evans' direct appeal was pending before the Virginia Supreme Court, that court ruled in another case that when a capital defendant's right to a fair and impartial jury is violated during the sentencing phase of a trial, a death sentence must be commuted to life imprisonment. *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). The Virginia Court premised its decision on a construction of the then-existing death penalty statute in Virginia, under which only the jury that found a capital defendant guilty could fix his punishment. Because the original jury in *Patterson*, tainted by constitutional error, could not be reconvened to resentence the defendant, the court ruled that Patterson's death sentence had to be reduced automati-

cally to life imprisonment. *Id.*, 283 S.E.2d at 216. *See also Evans II*, 323 S.E.2d at 116-17. (App. 33a). The *Patterson* ruling was in effect throughout Evans' direct appeal to the Virginia Supreme Court, and his first certiorari petition to this Court. *Patterson* remained in effect until March 28, 1983, when Virginia enacted emergency legislation amending its death penalty statute. The new amendment prospectively overturned *Patterson* by permitting resentencing before a new jury in capital proceedings, when the original sentencing jury's determination was later set aside or found invalid.[9]

Resentencing

Shortly before his scheduled execution, Evans obtained new counsel, who promptly discovered the constitutional infirmities in the exhibits by which Evans' death sentence had been obtained. In April 1982 counsel filed a petition for a Writ of Habeas Corpus in the Circuit Court of Alexandria, Virginia. The petition was amended in May 1982 to attack explicitly the purported conviction records presented by the Commonwealth. *See Evans II*, 323 S.E.2d at 117. (App. 34a). After resisting Evans' petition and delaying for nearly a year—while the Virginia legislature amended its death penalty statute to permit resentencing in capital cases—the Commonwealth's Attorney General conceded that Evans' death sentence could not "be sustained." (App. 34a-35a, 47a).[10] Thus, the trial

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[9] Virginia amended section 19.2-264.3 of its Code to provide that "[i]f the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty." Virginia Acts 1983, ch. 519 (March 28, 1983). *See Evans II*, 323 S.E.2d at 117. (App. 34a).

[10] The emergency legislation amending Virginia's death penalty statute passed the Virginia legislature and was signed by the Governor on March 28, 1983. *On that day* the Commonwealth's Assistant Attorney General informed Evans' counsel that the Commonwealth intended to concede error. The Commonwealth's formal concession of error was made in writing on April 12, 1983 (App.

court granted portions of the habeas petition and vacated Evans' death sentence.

Over Evans' objections, a resentencing hearing was held on January 31-February 2, 1984.[11] At that hearing, the Commonwealth arranged for actors to read portions of the transcript from Evans' 1981 trial. The reading included the crucial hearsay testimony of three inmate witnesses concerning statements allegedly made by Evans on the night before the shooting.[12] None of these inmate witnesses appeared live before the resentencing jury, though it is likely that all were within state custody and

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47a)—less than three weeks after amendment of the statute, and exactly two years after the Commonwealth had introduced at Evans' capital sentencing the evidence which, by the Commonwealth's own admission, it knew was false.

[11] This hearing, which could not have occurred under the law in effect at the time of Evans' conviction, sentencing or appeal, was ordered over Evans' objections that retroactive application of the new law violated the Constitution's proscription against ex post facto laws, U.S. Const. art. I, § 10, cl. 1, and deprived him of rights guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *See Evans II*, 323 S.E.2d at 117-22 (App. 35a-44a); *id.*, 471 U.S. at 1027-29 (Marshall, J., dissenting from denial of certiorari).

[12] At the resentencing hearing, Evans' counsel objected to specific portions of the 1981 transcript testimony, including portions of the inmate testimony, which the Commonwealth sought to introduce. The trial court overruled those objections, stating:

> Mr. Howard [counsel for Evans], as I have indicated to you earlier, it's not my intention to go through this entire transcript and give you an opportunity to make an objection or objections that you think counsel should have made during the course of the initial trial, and that's what you are seeking to do now.

(App. 95a). Evans' counsel, however, did not at that time object to the use of the 1981 transcript on the precise ground raised here: that it violated Evans' rights under the Sixth Amendment's Confrontation Clause. That constitutional claim was first raised in Evans' third amended state habeas petition, filed on May 14, 1985. *See infra* note 14.

could have been produced at the resentencing. In any event, the prosecutor made no showing that the witnesses were unavailable. The second jury recommended the death penalty, which the court imposed on March 7, 1984.

The Habeas Proceeding Below

Following his second death sentence, Evans filed a third amended petition for a writ of habeas corpus. In it he alleged, *inter alia*, that his court-appointed counsel, Brown and Long, had failed to provide effective assistance during his trial, first appeal, and first certiorari petition. The Honorable Donald Kent of the Circuit Court of Alexandria, Virginia, was assigned to hear Evans' third amended petition.[13]

In a summary order and without hearing, Judge Kent dismissed most of the claims in Evans' petition. (App. 1a). These included Evans' claim that he had been denied the effective assistance of counsel during the course of his first appeal, in that his counsel at the time had failed to discover or alert the court (including this Court) to the fact that Evans' death sentence had been obtained and defended on the basis of false evidence.[14]

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[13] Evans' habeas corpus petition presented the first three of the four issues presented here (*see* Sections I-III, below). The fourth issue (Section IV, below) was timely raised by motion, as discussed below. In its Answer, the Commonwealth moved to dismiss, without hearing, two of the claims (concerning ineffective assistance of counsel on appeal, and defects in the resentencing proceeding) at issue here; as to the third (concerning ineffective assistance at trial), the Commonwealth agreed to a plenary hearing. The Commonwealth separately opposed Evans' recusal motion (discussed in Section IV, below).

[14] Judge Kent's summary order also dismissed Evans' Confrontation Clause claim (claim VI, in the third amended habeas petition) concerning Virginia's rule permitting the use of prior transcript at the resentencing hearing. (App. 1a). The Commonwealth has asserted below, before the habeas judge and the Virginia Supreme Court, that this claim is barred by a procedural default under state law, because Evans did not object to the use

In the same order, Judge Kent set for plenary hearing three of Evans' claims, including the claim that counsel had provided ineffective assistance at trial by failing to

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of the prior transcript at the time of his resentencing. That assertion is erroneous. The Commonwealth sought dismissal of Evans' claim both on state procedural grounds, and on the federal constitutional merits. (*See* App. 98a-99a). As to the latter, the Commonwealth stated in its Answer to Evans' habeas petition:

> Furthermore, use of the transcript did not violate petitioner's constitutional rights. Petitioner had the opportunity to confront and cross-examine the witnesses in question at the time they originally testified [*i.e.*, at the guilt phase of his 1981 trial]. The Supreme Court of Virginia has approved such use of the transcript from the guilt stage of a trial when a defendant's death sentence is vacated and the case is remanded for a resentencing proceeding. [citing *Fogg v. Commonwealth*, 207 S.E.2d 847, 850 (1974), and other cases].

(App. 98a-99a). In granting the Commonwealth's request to dismiss this claim, the habeas court adopted the Commonwealth's reasoning, without making clear whether its ruling rested on the substantive or procedural ground urged by the Commonwealth. The court stated: "The Court finds for the reasons stated in the respondent's [*i.e.*, the Commonwealth's] answer that the petitioner is not entitled to the relief sought as to the remainder of his claims." (App. 1a).

When Evans presented the same federal constitutional claim to the Virginia Supreme Court, the Commonwealth again opposed it on both procedural and substantive grounds, in language identical to that used before the habeas court. (App. 101a-102a). The Virginia Supreme Court denied review, finding that "there is no reversible error in the judgment complained of." (App. 16a).

Although a state court finding that a state procedural bar precludes review of the merits may, in appropriate cases, constitute a bar to federal habeas review (absent a showing of "cause" and "prejudice"), *see Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), the mere possibility that the state court applied a state procedural bar will not suffice to oust federal jurisdiction. To the contrary, this Court has held that "the state court must *actually* have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (citing *Ulster County Court v. Allen*, 442 U.S. 140, 152-54 (1979) (emphasis added)). In this case it is impossible to tell whether either of the two state courts that reviewed Evans' Confrontation Clause claim

object to the inflammatory misstatements in the prosecutor's summation.

In preparing for the habeas hearing, Evans' present counsel discovered that E. Blair Brown—who had represented Evans at trial and on appeal and whose effectiveness was a central issue in the habeas petition—had been Judge Kent's courtroom clerk from 1974 through 1977. Because it was anticipated that Mr. Brown would be a principal witness at the evidentiary hearing, and because Mr. Brown's conduct was a principal focus of the inquiry, Evans timely requested that Judge Kent recuse himself. The Judge denied the motion orally by telephone, on December 6, 1985. The motion was renewed at the evidentiary hearing, and again denied. (App. 104a-105a).

An evidentiary hearing was held on December 16, 1985. During the hearing counsel were permitted to explore the relationship between Judge Kent and Mr. Brown. Brown testified that he had served as deputy court clerk in the Circuit Court of Alexandria (and the predecessor court) from 1972 through May 1977. (App. 106a). During this period Mr. Brown typically spent two days each week working in the courtroom. (App. 106a). From approximately 1974 through May 1977 Mr. Brown served as Judge Kent's courtroom clerk. (App. 108a). Although Mr. Brown assisted the other judges of the court as well,

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found it barred on procedural grounds. What is certain is that neither decision below "contains [a] clear or express indication that 'separate, adequate, and independent' state-law grounds were the basis for the Court[s'] judgment." *Caldwell v. Mississippi*, 472 U.S. at 327 (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). Thus, "the most reasonable explanation [of the decisions below is] that the state court[s] decided the case the way [they] did because [they] believed that federal law required [them] to do so." *Michigan v. Long*, 463 U.S. at 1041. Under these circumstances, Evans' failure contemporaneously to object on Sixth Amendment grounds to the prosecution's use of the prior transcript poses no bar to this Court's review of the merits of this claim.

he spent most of his time in court with Judge Kent, and worked for Judge Kent "whenever he was on the bench." (App. 108a).

As Judge Kent's courtroom clerk, Mr. Brown was responsible for what he termed some "real important" work, including: swearing witnesses, marking exhibits, swearing juries, administering the voir dire, and taking verdicts. (App. 108a). In addition, Mr. Brown frequently discussed pending cases with Judge Kent; and during trial delays or while awaiting verdicts, he would also discuss, "for several hours on end," a range of other topics with the Judge. (App. 109a, 110a).

Since entering the private practice of law, Mr. Brown has maintained a professional and personal friendship with Judge Kent. Mr. Brown has continued to discuss "broad general" topics with the Judge; and has socialized with Judge Kent on occasion. (App. 110a-111a).

On May 19, 1986, Judge Kent issued a letter opinion (App. 3a), followed by an order (App. 14a-15a), rejecting the remainder of Evans' claims and dismissing his habeas petition. Judge Kent found that the performance of his former courtroom clerk had been "skillful and well above the standard of competence required of defense counsel in a criminal case." (App. 10a).

Evans timely petitioned the Virginia Supreme Court for review of Judge Kent's decision. On February 26, 1987, the Supreme Court of Virginia issued a two-sentence order, finding that "there is no reversible error in the judgment complained of," and dismissing Evans' appeal. (App. 16a). This petition followed.[15]

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[15] Each of the four arguments in the instant petition was explicitly raised below—both before the state habeas judge (Judge Kent) and the Virginia Supreme Court—and was rejected. None of these claims has been presented previously to this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW WHOLLY IGNORES THE IMPORTANT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL RECOGNIZED IN *EVITTS*.

In *Evitts v. Lucey*, 469 U.S. 387, 389 (1985), this Court held that where a State provides an appeal of right, "the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant effective assistance of counsel on [his] appeal." *Evitts*, however, did not present an opportunity for this Court to define the parameters of "effective assistance" on appeal, and the Court specifically reserved judgment on that question.[16] At the same time, the Court noted that the numerous state and lower federal courts that had recognized a right to effective assistance of appellate counsel had "diverge[d] widely in the standards used to judge ineffectiveness, the remedy ordered, and the rationale used." *Id.* at 398 n.9. Since *Evitts*, state and lower federal courts have continued to struggle with these questions.[17]

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[16] "We . . . need not decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. *Cf. Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648 (1984)." *Evitts v. Lucey*, 469 U.S. at 392.

[17] *Compare Beavers v. Lockhart*, 755 F.2d 657, 660-61 (8th Cir. 1985) *and Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985) (assuming *Strickland* standard applies) *with Watson v. United States*, 508 A.2d 75, 86 (D.C. App.), *rehearing en banc granted, judgment vacated*, 514 A.2d 800 (D.C. App. 1986) (performance of appellate counsel ineffective "if it is so clearly prejudicial to substantive rights as to jeopardize the very fairness and integrity of the appeal proceeding.") Also *compare Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985) (failure to raise substantial claims on appeal may constitute ineffectiveness even where counsel competently raises other, non-frivolous claims) *with State v. Boyer*, 103 N.M. 655, 712 P.2d 1, 4 (N.M. App. 1985) (finding effective assistance of counsel on appeal where "counsel finds a non-frivolous ground and vigorously argues it"). *See also People v. Bailey*, 141 Ill. App. 3d 1090, 490 N.E.2d 1334, 1343 (Ill. App. 1986) (counsel's failure to raise

This case is dramatic proof that at least some of the lower courts have failed either to understand or correctly to apply the important principles announced in *Evitts*. Granting certiorari in this case would allow the Court to provide needed guidance on this important, unresolved question.

In the instant case, there cannot be any doubt that the Virginia courts either misunderstood or wholly ignored *Evitts*. Thus, they sanctioned—without providing an opinion, explanation, or reasoning—appellate conduct that fell far short of effective assistance under any reasonable constitutional standard of review. The stark fact of this case is that while Messrs. Brown and Long represented Evans, the Commonwealth secured a conviction and death sentence against him based on false conviction records, and then defended that conviction successfully on appeal for the next year. As the Commonwealth has long urged, throughout the course of the appellate proceedings Evans' counsel knew, or should have known, that the evidence supporting their client's death sentence was false. (*See* App. 81a-85a). According to the Commonwealth, defense counsel were explicitly informed of the erroneous convictions by the prosecutor's disclosures at

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substantial claims on appeal is ineffective only if his appraisal of the merits of those claims is "patently wrong"). Similarly, although the Virginia Supreme Court has recently recognized the right of an indigent criminal defendant to effective assistance of counsel on appeal, *Dodson v. Virginia Dept. of Corrections*, Record No. 860252, slip op. (April 24, 1987), it refused to apply that right in this case, or even to articulate why that right was inapplicable here.

Lower courts attempting to apply *Strickland* to claims of ineffective assistance on appeal have also shown confusion over the appropriate standard for judging prejudice. *Compare Bell v. Lockhart*, 795 F.2d 655, 657 n.7 (8th Cir. 1986) (counsel's failure to follow procedural rules that resulted in forfeiture of right of appeal may warrant new opportunity to appeal, regardless of the merits of the appeal) *with Davila v. State*, 718 S.W.2d 350, 352 (Tex. App. Amarillo 1986) (although counsel's incompetence precluded any appeal, no ineffectiveness under *Strickland* because appeal would not have been successful).

the end of the penalty phase of the trial, and later by the pre-sentence report. (App. 81a-82a). Whether this information actually alerted Evans' counsel to the falsity of Commonwealth Exhibits 19-21 is beside the point. At a minimum, counsel had a "duty to make [a] reasonable investigation," *Kimmelman v. Morrison*, 106 S. Ct. 2574, 2589 (1986), to determine the true nature of Evans' prior conviction record—just as habeas counsel did shortly after Evans' first certiorari petition was denied.

Notwithstanding the ample time from Evans' sentencing (on June 1, 1981) through the denial of his certiorari petition (on March 22, 1982), and the pressing need to rebut the Commonwealth's repeated assertions, in both the Virginia Supreme Court and this Court, that Evans' prior conviction record demonstrated his "future dangerousness" (App. 87a-92a), counsel for Evans did nothing to investigate, challenge, or correct the erroneous records. If the rights articulated by this Court in *Evitts v. Lucey* are to mean anything, they must mean, at a minimum, that an indigent defendant in a capital case is entitled to representation by counsel who, when alerted to serious error in his client's death sentence, will investigate the matter vigorously and with dispatch. To countenance the performance of counsel in this case and deem it reasonable, as the court below did (App. 1a, 10a), is to reduce the right of effective assistance on appeal to a mere "form of words." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

This Court has held that during trial effective assistance means more than simply filing pleadings on time and obeying procedural rules; to be effective, counsel must also investigate, and where appropriate, competently litigate important claims. *See Kimmelman v. Morrison*, 106 S. Ct. at 2588-89.[18] The lower courts need a clear instruction that that same principle governs the right to effec-

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[18] *Cf. McMann v. Richardson*, 397 U.S. 759, 770 (1970); *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion) (Counsel have a duty to "make an independent examination of the facts, circumstances, pleadings and law involved . . . .")

tive assistance on appeal—particularly where the defendant is an indigent facing a capital sentence.[19]

Evans' counsel's failure to investigate or challenge their client's conviction records throughout the course of the appeal was clearly "deficient" under the standard articulated by this Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Moreover, counsel's deficient performance prejudiced the defense, since there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. While *Strickland* held that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.*,[20] there is no need for conjecture in the instant case about the probable outcome had Evans' counsel acted diligently after receiving the pre-sentence report on June 1, 1981. That report explicitly stated that the most serious prior "conviction" used to secure Evans' death sentence was not a conviction at all. (App. 58a). If counsel had challenged Evans' death sentence then, or at any time during the year-long appellate process, the sentence would necessarily have been vacated, as indeed it later was. (App.

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[19] The lower courts, including the Virginia Supreme Court, have already recognized that the "seriousness of the offense and the severity of the [possible] punishment" are relevant factors in assessing the adequacy of counsel's performance. *See Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399, 403 (1984); *Stanley v. Zant*, 697 F.2d 955, 962-63 (11th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984); *Proffitt v. Wainwright*, 685 F.2d 1227, 1247 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002-03 (1983). *Cf. Beck v. Alabama*, 447 U.S. 625, 637 (1980) (the risk of error that may be acceptable in a non-capital case "cannot be tolerated in a case in which the defendant's life is at stake," since "there is a significant constitutional difference between the death penalty and lesser punishments . . . .").

[20] More recently this Court has stated that "a defendant need not establish that [his] attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland* . . . ." *Nix v. Whiteside*, 106 S. Ct. 988, 999 (1986).

34a-35a).[21] Counsel's failure to raise (or even to investigate) this ground for relief prejudiced Evans by depriving him of the certain reversal of his sentence during his first appeal.

Counsel's failure has had grave, lasting consequences; it has meant, literally, the difference between life and death. The timing of counsel's failure was of paramount importance to the outcome of Evans' case. Shortly before the Virginia Supreme Court ruled on Evans' appeal, it held in another case, *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (Oct. 16, 1981), that under Virginia's death penalty statute as it stood at that time, a capital defendant whose sentence was set aside could not be resentenced to death. That ruling was in effect two months later when the Virginia Supreme Court decided Evans' direct appeal, on December 4, 1981. It remained in effect for a full year after this Court denied certiorari (in March 1982), until Virginia amended its death penalty statute on March 28, 1983. *See supra* notes 9, 10. If Evans' counsel had raised on appeal the errors underlying his conviction (as competent counsel would have done), there cannot be the slightest doubt about the outcome: Evans' death sentence, like Patterson's, would have been commuted to life imprisonment. Counsel's failure to provide effective assistance on appeal denied Evans the benefit of the law as it existed at the time and resulted in a second sentencing, which otherwise would not have been permitted.[22]

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[21] This Court has squarely held that criminal sentences based on unconstitutional or otherwise invalid conviction records violate due process and cannot stand. *United States v. Tucker*, 404 U.S. 443, 447-48 (1972); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). The Commonwealth itself recognized that principle when it ultimately conceded error. (App. 48a-49a).

[22] The second sentencing procedure did not and could not cure the prejudice suffered by Petitioner for the obvious reason that a second sentencing would not have been permitted had counsel

II. THE COURT BELOW COUNTENANCED CONDUCT BY COUNSEL THAT FELL FAR BELOW THE STANDARDS SET BY THIS COURT, IN THAT COUNSEL FAILED TO CHALLENGE THE PROSECUTION'S FALSE AND HIGHLY PREJUDICIAL SUMMATION.

At the close of the evidence in the guilt phase of Evans' trial, the Commonwealth's Attorney misled the jury in an extremely material area by stating twice: "Two witnesses said [Evans] had nothing to lose; he'd killed people in North Carolina; he'd absolutely nothing to lose." (App. 56a). In fact, Evans had not "killed people" before and there was no evidence that he had. The prosecutor's argument left the jury with the impression that Evans was a multiple murderer who would likely kill again. It also suggested that the prosecutor knew of evidence, not before the jury, that would substantiate that charge. Moreover, the prosecutor's misstatement directly flouted two earlier instructions by the court not to speculate about the existence of such "evidence." (App. 53a, 55a). That defense counsel permitted these misstatements to go unchallenged is incredible, in light of the fact that they were improper, untruthful, and extremely prejudicial. Counsel had an obligation to object to the prosecutor's false and prejudicial remarks, or at least to request a cautionary instruction from the court. It was abject error to have done neither.

This Court has long held that a state prosecutor's improper, prejudicial and deliberate misstatements of fact concerning material evidence before the jury may deprive a criminal defendant of the right to a fair trial

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effectively represented Evans on his first appeal. *Cf. Evans II*, 471 U.S. at 1029 ("[T]he State's continued, knowing use of false evidence during the direct appeal and petition for certiorari, and its failure to disclose this misconduct, constituted egregious conduct that seriously harmed Evans.") (Marshall, J., dissenting from denial of certiorari) (footnote omitted); *id.* at 1028 (the "remedy" of "a new sentencing hearing free from the taint of false evidence . . . was inadequate to undo the harm suffered by Evans.").

guaranteed by the Fourteenth Amendment. *See Miller v. Pate*, 386 U.S. 1, 6-7 (1967). *Cf. Berger v. United States*, 295 U.S. 78, 84-85 (1935) (reversing a federal conviction, where the federal prosecutor "was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; . . . [and] of assuming prejudicial facts not in evidence . . . ."). More recently, the Court has revisited the thorny question of prosecutorial misconduct during closing argument, but in a far different context than the one presented here.[23] The Court has not, to our knowledge, ever addressed the application of its *Strickland* test in a capital case where the defendant's counsel sat mute, while the prosecutor misstated critical evidentiary facts in his summation.[24] This case squarely raises that important question.

In this case, counsel's failure to challenge or even address the prosecutor's inflammatory misstatement of the evidence was clearly "deficient" under the standard of performance articulated in *Strickland*, 466 U.S. at 687. The court below misunderstood *Strickland* and incorrectly characterized counsel's error as a tactical judgment. (App. 13a). The court reasoned that, since the trial

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[23] *Darden v. Wainwright*, 106 S. Ct. 2464 (1986); *United States v. Young*, 470 U.S. 1 (1985).

[24] Neither *Darden v. Wainwright* nor *United States v. Young* involved a collateral attack on the competence of counsel in failing to object to the prosecutor's improper summation. Counsel in those cases either "invited" the prosecutor's misconduct, *Young*, 470 U.S. at 11-12, or effectively responded to it in rebuttal. *Darden*, 106 S. Ct. at 2473. More importantly, although the prosecutor's argument at issue in those cases included improper personal attack, statements of opinion concerning the credibility of the witnesses, and comments reflecting an emotional reaction to the case, *see Darden*, 106 S. Ct. at 2471-72 & nn.5-12; *Young*, 470 U.S. at 4-6; it did not involve an effort to "manipulate or misstate the evidence," *Darden*, 106 S. Ct. at 2472; *see Young*, 470 U.S. at 4-6. That is the one critical area of misconduct that this Court has previously stated can fatally undermine a verdict. *See Miller v. Pate*, 386 U.S. at 6-7; *Berger v. United States*, 295 U.S. at 84-85.

judge had already admitted the inmates' hearsay testimony over defense counsel's objection, a further objection to the prosecutor's closing argument "would have been overruled" and would have "increased the jury's awareness" of the damaging evidence. (App. 13a). That conclusion is patently wrong; and the Virginia Supreme Court's failure even to review its validity is persuasive evidence of the need for further guidance from this Court.

Contrary to the suggestion of the court below, the prosecutor's statement was not a summation of the existing evidence, but instead, a flagrant mischaracterization of it that invited the jury to disregard the court's earlier instructions and conclude that Evans had in fact "killed people in North Carolina." The prosecutor's repeated, calculated misstatement of the evidence not only violated Evans' federal right to a fair trial, *see Miller v. Pate*, 386 U.S. 1 (1967), but was also reversible error under Virginia law.[25] No risk of highlighting unfavorable inmate testimony could possibly outweigh the risk of permitting the jury erroneously to believe that the defendant was a multiple murderer. Even if counsel believed it tactically unwise to interrupt the prosecutor's argument, counsel could, "[a]t the very least," have sought "a bench conference . . . out of the hearing of the jury . . . and an appropriate instruction . . . ." *United States v. Young*, 470 U.S. at 13-14. Counsel's failure to take *any* corrective action cannot be excused as a "tactical judgment," when the tactic was based on apparent ignorance of the facts or law, and in any event contra-

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[25] The law on prosecutorial misstatements in Virginia is clear: telling the jury that a defendant has committed multiple murders, when there is no such evidence in the record, is harmful error. *See, e.g., Hutchins v. Commonwealth*, 220 Va. 17, 255 S.E.2d 459, 461 (1979); *Artis v. Commonwealth*, 213 Va. 220, 191 S.E.2d 190, 195 (1972); *McLane v. Commonwealth*, 202 Va. 197, 116 S.E.2d 274, 281 (1960).

vened "sound trial strategy." *Strickland*, 466 U.S. at 689. *See Kimmelman v. Morrison*, 106 S. Ct. at 2588.

Counsel's failure was also highly prejudicial to Evans. The prosecutor's statement that Evans had "killed" or admitted to killing people in North Carolina was not simply an unauthorized "matter of opinion," but a " 'consistent and repeated misrepresentation' " of crucial evidence that could "profoundly impress a jury and . . . have a significant impact on the jury's deliberations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974) (quoting *Miller v. Pate*, 386 U.S. at 6). The prosecution's case had essentially been to suggest that Evans was a man who would "try any means possible to escape" from prison. (App. 53a). The suggestion that Evans was a multiple murderer had the intent and effect of impressing on the jury that Evans had a much stronger motive to escape than anything demonstrated by the evidence. This misstatement would have been particularly persuasive because, unlike the inmate hearsay testimony on which much of the prosecution's case rested, it "carrie[d] with it the imprimatur" of the Commonwealth. *United States v. Young*, 470 U.S. at 18-19. *See Berger v. United States*, 295 U.S. at 88-89; *Donnelly v. DeChristoforo*, 416 U.S. at 651-52 n.* (Douglas, J., dissenting). Under these circumstances, there is more than a "reasonable probability that, but for counsel's unprofessional errors," the jury would have reached a different result. *Strickland*, 466 U.S. at 694.

III. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FIRST IMPRESSION CONCERNING VIRGINIA'S PRACTICE OF SUBSTITUTING DRAMATIZED TRANSCRIPT TESTIMONY FOR LIVE TESTIMONY AT CAPITAL RESENTENCING HEARINGS.

For more than a decade the Virginia Supreme Court has explicitly authorized a procedure by which prosecuting attorneys are permitted to introduce at capital resentencing hearings transcript testimony from earlier

proceedings, without demonstrating that the witnesses whose testimony is used are unavailable to appear in person.[26] This longstanding practice, used in the instant case, violates the Confrontation Clause of the Sixth Amendment to the United States Constitution and conflicts with the decision of at least one other state court.[27] With bifurcated trials and resentencing hearings becoming more common in capital cases, it is imperative that the lower courts receive clear instruction on the procedural rights of criminal defendants in such proceedings.

This case provides a particularly compelling example of the inherent dangers and unfairness when the prosecution ignores those rights. The Commonwealth secured a guilty verdict against Evans in April 1981 largely on the basis of adverse, hearsay testimony from witnesses incarcerated with Evans on the night before the shooting. At Evans' resentencing in January 1984, a new jury—which had had no prior contact with the case—was impanelled to determine whether there was a "probability that [Evans] would commit criminal acts of violence that would constitute a continuing serious threat to society . . . ." Virginia Code § 19.2-264.2(1) (1983). The prosecution again relied, as it had in 1981, on the same inmate witnesses to prove that Evans had said he had "nothing to lose" by attempting escape, and that he would "try any means possible to escape." (App. 53a; *see supra* note 2). But instead of presenting the live testimony of those witnesses, as it had at the guilt trial three years earlier, the Commonwealth designated actors to read from portions of the 1981 transcript. In reliance on long-settled decisions of the Virginia Supreme Court (*see* App. 49a-50a, and *supra* notes 14, 26), the Commonwealth made no effort to demonstrate that the inmates whose

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[26] *See Fogg v. Commonwealth*, 207 S.E.2d at 850 (1974); *Huggins v. Commonwealth*, 213 Va. 327, 191 S.E.2d 734, 736 (1972); *Snider v. Cox*, 212 Va. 13, 181 S.E.2d 617, 618 (1971).

[27] *See Tichnell v. State*, 290 Md. 43, 427 A.2d 991, 997, 1000-01 (Md. 1981).

testimony it chose to dramatize were unavailable to testify in person before the new jury. This procedure denied Evans the opportunity to confront or cross-examine the inmate witnesses on whose testimony his second death sentence rested.

This Court has long held that at the guilt phase of a criminal trial the Confrontation Clause of the Sixth Amendment guarantees the accused the right to "confront" an adverse witness and to compel that witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980), (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)). Thus, in a series of cases involving criminal trials, this Court has prohibited states from substituting the stale transcript of a witness' testimony for live testimony when the witness is "available to testify." *See Pointer v. Texas*, 380 U.S. 400 (1965); *Barber v. Page*, 390 U.S. 719 (1968). Moreover, the Court has placed upon the prosecutor the burden to prove that such witnesses are unavailable and has held that "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.*, 390 U.S. at 724-25.

The same principles should invalidate a sentence based on the procedure used by the Commonwealth in this case. At a capital sentencing hearing, where the crucial issue of life and death is determined, it is imperative that the jury be given the opportunity to see the defendant's accusers and to weigh their testimony as to aggravating factors in light of their demeanor and credibility. Moreover, the defendant should have the right, denied in this proceeding, to examine the adverse witnesses live before the new jury to determine, at a minimum, their present recollection of events upon which a sentence of death may ultimately rest. Though the constitutional right may yield in appropriate circumstances where a witness is no

longer available, a state should not be permitted to render that right nugatory at its own behest by the simple expedient of reading stale transcript testimony, without any showing of a "good faith effort" to produce the witnesses live at trial.[28]

At least one other state court, dealing with facts almost identical to those found here, has struck down as unconstitutional a procedure identical to the one used here by Virginia. *See Tichnell v. State*, 290 Md. 43, 427 A.2d 991, 997, 1000-01 (Md. 1981).[29] It is important to resolve at the earliest opportunity the conflict between

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[28] The Commonwealth's purpose in substituting the "testimony" of actors for that of inmates is only too plain. By doing so, the Commonwealth was able to shield its inmate witnesses, whose demeanor and testimony might seem inherently suspect, from the crucible of cross-examination before a jury that had never seen them. In addition, by presenting prior testimony already frozen in time, the prosecution effectively denied Evans' new defense counsel any opportunity to cross-examine those adverse witnesses, including any effort to test their recollection at the time of the resentencing to determine whether it remained consistent with their earlier testimony. Not only did those witnesses not appear before the resentencing jury, but over Evans' objections, the resentencing judge expressly prohibited any challenge to portions of their earlier testimony. (*See supra* note 12). This is a particularly startling and unfair result, in light of Evans' claims that his former counsel (who cross-examined the inmate witnesses when they appeared live in 1981, before a different jury) had provided ineffective assistance at that time.

[29] The facts in *Tichnell* were almost identical to those in the present case: the defendant was convicted of shooting a police officer based upon the testimony of witnesses. The State later relied on this testimony to establish aggravating circumstances at the penalty stage. When the defendant's first sentence was vacated and a new sentencing jury impanelled, the prosecution presented the transcript of the previous guilt trial to the new jury. Citing the Sixth Amendment decisions of this Court, the Maryland Court of Appeals overturned the second sentence. The Court noted that "the demeanor and credibility of the State's witnesses . . . was of critical importance to the sentencing jury in determining whether aggravating circumstances existed . . . ." *Id.* at 1000.

these two courts, since the question is likely to arise repeatedly in the future. This Court should make clear, as it has in other contexts, that in capital resentencing proceedings states may not pick and choose the circumstances under which their prosecutors will present the live testimony of adverse witnesses.

IV. THE REFUSAL OF THE HABEAS JUDGE BELOW TO RECUSE HIMSELF UNDER CIRCUMSTANCES INDICATING THE LIKELIHOOD OF HIS BIAS AGAINST THE PETITIONER VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Shortly before the habeas hearing, counsel for Petitioner learned that E. Blair Brown, the attorney whose competence was a principal issue in the hearing, had served for three years as the courtroom clerk of the Judge assigned to hear Evans' habeas petition. Petitioner promptly requested the Judge to recuse himself, but he denied the motion. Judge Kent's failure to recuse himself deprived Petitioner of the "neutral and detached" decisionmaker at his habeas hearing that due process requires. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). This Court should grant certiorari to affirm that in post-conviction proceedings as elsewhere a State may not arbitrarily deny fundamental liberty interests without providing due process of law. It is particularly important to vindicate that principle in a case such as this, in which the Commonwealth's admitted misconduct—in deliberately securing a death sentence on the basis of evidence known to be false—has already undermined public trust in the integrity of the judicial process. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

There is, to be sure, no constitutional requirement that the Commonwealth of Virginia provide a system of post-conviction review. But having chosen to establish such a system, Virginia must "act in accord with the dictates of the Constitution—and, in particular, in accord with

the Due Process Clause." *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Given the nature of the adjudicatory tasks to be performed by Judge Kent, and the long-term effects that such proceedings typically have on a defendant's ability to assert constitutional rights, due process required that he be "neutral and detached." *Morrissey v. Brewer*, 408 U.S. at 489. All the circumstances here indicate that, regardless of Judge Kent's subjective belief that he could act impartially (App. 105a), it was unlikely that he could be a truly "neutral" decisionmaker. The claim he was asked to resolve required him to pass judgment on the effectiveness, competence, and veracity of a former long-time employee who had been entrusted with the responsibilities attendant to judicial office.[30]

In the present instance, as is typical where a decisionmaker's impartiality is challenged, there is no objective way of demonstrating Judge Kent's bias in favor of his former employee. Nevertheless, because " 'justice must satisfy the appearance of justice,' " this Court has previously stated that " 'every procedure which would offer a possible temptation to the average man as a judge . . .

[30] Virginia's Canons of Judicial Conduct provide that "[a] judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Canons of Judicial Conduct, Part 6, Section III, Canon 3 (C)(a) (1986). In *United States v. Ferguson*, 550 F. Supp. 1256, 1259-60 (S.D.N.Y. 1982), Judge Weinfeld, faced with a situation analogous to the present case, held that a judge should recuse himself if "a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality." In that case Judge Weinfeld did recuse himself from a trial in which his former law clerk (who had held that position for only one year) had been a witness before the grand jury on a peripheral matter. *Id.* at 1257, 1259-60. The fact that a judicial action is widely regarded by other judges as improper and violates Judicial Canons of Ethics is of course not determinative of its constitutionality; nevertheless, such facts can provide strong evidence that the challenged action offends the Constitution as well as a sense of judicial ethics. *See Nix v. Whiteside*, 106 S. Ct. 988, 994-97 (1986).

not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (citations omitted). Despite Judge Kent's subjective belief that he could act impartially, "experience teaches that the probability of actual bias" in such a situation—in which the Judge was required to assess the veracity and competence of a former colleague—"is too high to be constitutionally tolerable." *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975). At the very least, it is clear that this is an area in which the lower courts could benefit from guidance by this Court.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the order and opinion of the Circuit Court of Alexandria, Virginia.

Respectfully submitted,

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May 1, 1987

STATUTORY APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

Amendment XIV, § 1 provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Virginia Code § 18.2-31 provides:

> § 18.2-31 *Capital Murder defined; punishment.*
>
> The following offenses shall constitute capital murder . . . .
>
> (f) The willful, deliberate and premeditated killing of a law-enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties.

Virginia Code § 19.2-264.2 provides:

> § 19.2-264.2 *Conditions for imposition of death sentence.*
>
> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society . . . .

Virginia Code § 19.2-264.3 provides:

> § 19.2-264.3 *Procedure for trial by jury.*
>
> A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence . . . .
>
> C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty . . . .
>
> If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

Virginia Code; Rules of Supreme Court of Virginia, Part 6, § III, provides:

> Canons of Judicial Conduct, Part 3(C)(a); Disqualification:
>
> A judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

86 1754

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ALEXANDRIA, VIRGINIA

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May 1, 1987

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VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF ALEXANDRIA

Law No. 7371-H.C.

WILBERT LEE EVANS,
Petitioner,

v.

TONI V. BAIR, SUPERINTENDENT,
Respondent.

ORDER

Upon mature consideration of the third amended petition of Wilbert Lee Evans for a writ of habeas corpus, the amended bill of particulars filed by the petitioner, the answer of the respondent and the authorities cited therein, and a review of the court records in the case, *Commonwealth of Virginia v. Wilbert Lee Evans* (F-5105), all of which are hereby made a part of the record in this matter, the Court finds that a plenary hearing should be held to determine claims II(a), II(h), and II(ff) to the extent those claims allege a failure of counsel to call character witnesses at petitioner's guilt trial; claims II(g) and II(cc) to the extent those claims allege a failure of counsel to object to the admission of petitioner's statements at the guilt trial; and claims II(m), II(bb), and II(dd). (The designations attached to petitioner's claims are the designations that appear in the respondent's answer). The Court finds for the reasons stated in the respondent's answer that the petitioner is not entitled to the relief sought as to the remainder of his claims. It is, therefore,

ORDERED that a plenary hearing be held to determine claims II(a), II(h), and II(ff) to the extent those

claims allege a failure of counsel to call character witnesses at petitioner's guilt trial; claims II(g) and II(cc) to the extent those claims allege a failure of counsel to object to the admission of petitioner's statements at the guilt trial; and claims II(m), II(bb), and II(dd).

As to the remainder of petitioner's claims, it is ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court petitioner's exceptions are noted.

The Clerk is directed to forward a certified copy of this Order to the petitioner; to the respondent; to Richard F. Goodstein, Esquire, counsel for petitioner; and to Donald R. Curry, Assistant Attorney General.

ENTERED this 18th day of September, 1985.

/s/ Donald H. Kent
Judge

A COPY TESTE:
EDWARD SEMONIAN
Clerk

By: /s/ [Illegible]
Deputy Clerk

I ask for this:

/s/ Donald R. Curry
Counsel for respondent

Seen and objected to:

/s/ Richard F. Goodstein
Counsel for petitioner

CIRCUIT COURT OF ALEXANDRIA
VIRGINIA

Judges

DONALD HALL KENT

DONALD M. HADDOCK

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May 19, 1986

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Re: Evans v. Bair
Law No. 7371 H.C.

Gentlemen:

This case came on for disposition of Wilbert Lee Evans' Third Amended Petition for a Writ of Habeas Corpus Ad Subjiciendum, filed pursuant to Va. Code § 8.01-654. Many of the allegations in the Third Amended Petition were dismissed or withdrawn prior to the evidentiary hearing. The only remaining claim is that Evans received ineffective assistance of counsel at his trial. Evans cites three specific areas in which he claims his counsel were ineffective, to-wit:

I. Failure to interview and introduce testimony of character witnesses on Evans' behalf;

II. Failure to move to suppress a statement taken from Evans after his arrest; and

III. Failure to object to the prosecutor's closing argument.

The Court, having duly considered the pleadings and briefs filed by the parties, and the evidence adduced before it at the evidentiary hearing on December 16, 1985, renders the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. *Failure to interview and introduce testimony of character witnesses on Evans' behalf*

Prior to Evans' capital murder trial, he gave to his attorneys a list of names of people who he thought might be able and willing to act as his character witnesses. Additional names were obtained from Thomas Graham, Evans' cousin.

Following up on the lists given them by Evans and Graham, counsel for Evans travelled to Raleigh, North Carolina, and spoke with some of Evans' relatives, both in person and over the telephone. Specifically, they spoke with his father, his sister, his aunts, his cousins and his wife. They also spoke with Evans' attorney in North Carolina. They spent approximately three (3) hours in Raleigh.

Evans' counsel also contacted several of his relatives and friends in the Washington, D.C. area. They spoke with Thomas Graham and Justine Hooker, two of Evans' cousins, with his golfing acquaintances at Rock Creek Park Golf Course, and with his former employer at Hoffberg's Restaurant. They "followed up" on every name given to them by Evans and Graham.

Defense counsel called no character witnesses at the guilt stage of the capital murder trial, and offered three reasons for their failure to do so. First, even if each character witness would have testified favorably to Evans as far as his reputation for truthfulness and veracity is concerned, the prosecutor would have been permitted to cross-examine those witnesses, and that cross-examination would have elicited evidence of Evans' prior larceny record and a recent robbery. Second, defense counsel wanted to maintain a "low profile" so as not to lead the prosecution to witnesses who could provide them with damaging "future dangerousness" testimony in the sentencing phase of the case. Finally, defense counsel believed that Evans himself was a very credible witness who did not need a supporting character witness.

Evans presented five individuals at the evidentiary hearing who were prepared to act as character witnesses at the murder trial. First, James Carew, who is a retired government attorney, knew Evans eight (8) to ten (10) years ago at the Rock Creek Golf Course. He testified that Evans was considered truthful and was "accepted" in the golfing circle at Rock Creek. Mr. Carew, however, was not aware of Evans' larceny record, nor of the robbery. Second, Evans presented Marilyn Lapowski who was his employer at Hoffberg's Restaurant some number of years prior to the murder. She could only offer her "personal opinion" as opposed to any general reputation testimony. Third, Thomas Graham, who is Evans' cousin, testified that he was like a father to Evans and that Evans had a reputation for being truthful. He, too, was unaware of the larceny record and robbery, and said that knowledge of such acts would affect his testimony. Similar testimony was offered by Justine Hooker, another of Evans' cousins. Finally, Evans offered Howard Schwartz who was one of his golfing partners. Mr. Schwartz admitted to having memory lapses and could not remember how many years ago

it was that he used to play golf with Evans. On direct examination Mr. Schwartz testified that Evans had a good reputation for truthfulness, but on cross-examination stated that he was in fact merely testifying as to his own opinion and not to a reputation. He further testified that he was not aware of the larceny record or the robbery, and that he knew little about Evans' personal life beyond the golf course.

Evans also offered John Zwerling as an expert witness. Mr. Zwerling testified that if an attorney puts his client on the witness stand, he should then offer some evidence in corroboration of the client's testimony. If no corroborating eyewitness testimony or physical evidence can be found, Mr. Zwerling stated that a character witness should be used. Mr. Zwerling admitted that there is some danger in putting on character witnesses when, as in this case, they possess harmful information that could be elicited on cross-examination or in the prosecution's case.

II. *Failure to move to suppress a statement taken from Evans after his arrest.*

After shooting Deputy Truesdale and escaping from the jail, Evans was pursued through the streets of Old Town and recaptured in a nearby parking lot. He had suffered two gunshot wounds. The first wound was to his finger, sustained when he shot off his handcuffs at the jail. The second wound was a "very minor wound" to his abdomen, sustained when his gun fired immediately prior to his capture.

The police called for an ambulance. The paramedics responded to the scene and conducted an examination of Evans. They bandaged his abdominal wound, although it had stopped bleeding at that point, and his finger wound. The paramedics determined that no further medical treatment was needed.

Evans was then placed in a police cruiser and transported to the police station. During the trip "[h]e seemed very calm. He didn't move around." At the police station Evans was placed in a small room (approximately 6′ x 7′) which had no windows, one table and three chairs. Evans was handcuffed to the chair but his feet were not shackled. Also present in the room were two police officers, Lewis Pugh and Wayne Robey. Evans was read his *Miranda* rights and remained very calm.

Evans then gave the police a statement which was recorded and later transcribed. (Exh. 7). At the start of the tape, Evans was re-Mirandized. There is no credible evidence that the atmosphere was coercive, that Evans was in a "frenzy," or that he was pressured or threatened in any way. Likewise, there is no credible evidence that Evans was suffering from any excessive pain from his gunshot wounds or that he ever requested medical assistance.

The statement given to the police by Evans reflects his contention that the escape was not planned and that the shooting of Deputy Truesdale was accidental. Evans stated that he only intended to shoot off his handcuffs. Defense counsel believed that the recorded statement was "consistent with the . . . defense [they] wished to use."

In addition to the recorded statement, Inv. Pugh was expected to testify at the guilt stage of the trial that Evans made other statements to the police that were not recorded. The substance of those statements was to the effect that Evans had nothing to lose by killing Deputy Truesdale and that he would keep trying to escape until he succeeded or was killed. Evans denies ever having made such statements.

Defense counsel never moved to suppress the statements given to the police. First, they concluded that no grounds for such a motion existed. There was no question that Evans had been properly Mirandized on at least two oc-

casions, and they testified that Evans gave them no facts to support such a motion on voluntariness grounds. Second, they reasoned that the recorded statement was consistent with the defense's theory of the case and was therefore exculpatory in nature. Insofar as Inv. Pugh's expected testimony in regard to the oral statement, defense counsel concluded that they could adequately impeach Inv. Pugh by presenting the inconsistent recorded statement.

At the trial, the prosecution did not use the statements in its case-in-chief. The prosecutor did use some of the oral statements allegedly made to Inv. Pugh in its cross-examination of Evans at the guilt stage. The prosecution introduced no rebuttal evidence. At the penalty stage, however, Inv. Pugh did testify as to the unrecorded statements made to him by Evans. Defense counsel used the recorded statement to impeach Inv. Pugh.

Evans' expert witness testified that it was below the standard of competence required of attorneys in criminal cases to fail to make a non-frivolous motion to suppress a damaging statement to the police. First, he stated that the defense should try to prevent the prosecution from using such a statement as direct evidence or as an impeachment tool on cross-examination. Second, he stated that a pretrial motion to suppress can be an important discovery tool.

Prior to trial, defense counsel filed discovery motions. They received, *inter alia*, the tape-recorded statement made by Evans. They reviewed everything they received from the Commonwealth and went over it with Evans prior to the trial.

III. *Failure to object to the prosecutor's closing argument.*

At the guilt stage of the trial, the prosecution's witnesses testified to prior bad acts of Evans. Defense

counsel noted their objection to such evidence, which objection was overruled. Judge Wright ruled that such evidence was admissible solely to show Evans' motive and intent. That ruling was upheld on direct appeal.

During final argument the prosecutor made the following statements:

> We start out with motive. And why would Wilbert Evans come up here to escape and why would he go to the extent of killing someone to do it? Two witnesses said he had nothing to lose; he'd killed people in North Carolina; he'd absolutely nothing to lose. He was going to escape no matter what. He would go to any extent not to go back to North Carolina . . . .
>
> Did he have motive, bias? I'll tell you he had all the motives and bias; he's facing the death penalty. He told people he killed people and was facing life imprisonment in North Carolina.

Defense counsel made no objection to those statements. Likewise, they sought no limiting instruction. They profferred two principal reasons for their failure to do so. First, they concluded that an objection and instruction would no nothing more than highlight the argument for the jury. Long stated "I thought we didn't want to keep bringing it up and bringing it up. The damage was done when the Court let in that information to begin with in my opinion." Second, defense counsel considered the argument during the trial. Therefore, they felt it was not likely that their objection would be sustained at that point.

CONCLUSIONS OF LAW

The standard by which a Court is to adjudicate the merits of a petition for a writ of habeas corpus based upon a claim of ineffective assistance of counsel is set forth in *Strickland v. Washington*, —— U.S. ——, 104 S. Ct. 2052 (1984), and in *Virginia Department of Corrections v. Clark*, 227 Va. 525 (1984). Generally, the

issue is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 104 S. Ct. at 2064. This leads to a two-pronged test.

> First, the defendant [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. The Court must be "highly deferential" in scrutinizing counsel's performance and must "evaluate the conduct from counsel's perspective at the time" of the trial. *Id.*

In light of these principles the Court finds that Evans was adequately assisted by counsel both before and during his 1981 capital murder trial. Counsel's performance in each of the three areas criticized by Evans was skillful and well above the standard of competence required of defense counsel in a criminal case. Moreover, even if Evans' claim that his counsel's performance in the three cited areas was objectively unreasonable were well-taken, these errors, considered both individually and collectively, were not "so serious as to deprive the defendant of a fair trial." *Id.* The reason for the above findings are set forth below, *seriatim.*

I. *Character Witnesses.*

The evidence reveals that defense counsel obtained a list of potential character witnesses from Evans and Thomas Graham. Defense counsel then "followed-up" on every lead given to them. Their follow-up was not limited to local investigation, but included a trip to North Carolina

as well. It is clear that these steps amount to a reasonable investigation into the possibility of using character witnesses.

The defense attorneys chose not to call any character witnesses because of the damaging evidence that could have been elicited in the form of "Have you heard . . ." questions on cross-examination. Although the evidence shows that a number of people, including several upstanding citizens not related to Evans, would have been willing to testify favorably to Evans regarding his reputation for truth and veracity, such evidence was not available without paying a substantial price in the form of evidence of a prior larceny conviction and recent robbery. Further, the witnesses had knowledge of violent acts committed by Evans in the past which the prosecution could then have introduced at the sentencing phase of the trial. Defense counsel made a tactical decision not to call any of the character witnesses because of this adverse evidence risk. That decision was an informed one and one that was made only after careful consideration of all of the surrounding circumstances. The Court cannot conclude that their chosen tactic was an unreasonable one.

Even if it is assumed, *arguendo*, that Evans' counsel erred in failing to call character witnesses, that error did not prejudice the defense to the extent that Evans was denied a fair trial. Evans himself took the witness stand, related his version of the incident, and was in his attorneys' judgment a very credible witness. There is no reasonable probability that the introduction of relatives and friends as character witneses, even without the expected adverse cross-examination, would have altered the fact-finder's final decision.

II. *Evans' Statement.*

An attorney cannot be said to have acted unreasonably if he failed to make a frivolous motion to suppress. Any such motion in this case would have been frivolous.

Evans had been legally arrested and had been properly Mirandized prior to the giving of any statement to the police. Evans gave his attorneys no evidence to support a motion on voluntariness grounds. The evidence presented to the Court is that Evans was very calm, not coerced and not in any excessive pain from his gunshot wounds. The fact that his finger may have been bleeding at the time of the statement or even that he may have been experiencing some degree of pain does not lead to the conclusion that the statement was involuntary. A reading of the transcribed statement conveys the impression that Evans was very calm, in control of his senses, and not in any severe pain.

The statement itself was basically consistent with Evans' defense, that is, the theory that the shooting was accidental. The prosecutor did not even use the statement in his case-in-chief, presumably because the statement corroborated Evans' live testimony and was therefore exculpatory in nature. As such, it cannot be said that the failure to suppress the recorded statement prejudiced the defense.

The damaging oral statement allegedly given to Inv. Pugh by Evans was introduced in the sentencing stage of the trial. Inv. Pugh, however, was impeached with the inconsistent transcribed statement. Counsel for Evans, after careful consideration of the situation, concluded that the defense was in a stronger position with the corroborating transcribed statement and the impeached oral statement than they would have been with no statements at all. This conclusion was a reasonable one.

III. *Prosecutor's Closing Argument.*

The statement made by the prosecutor was gleaned from testimony adduced during the Commonwealth's case-in-chief. That live testimony had been objected to by defense counsel at the time of its introduction, but to no

avail. Judge Wright correctly concluded at that time that the testimony was admissible to prove motive and intent. Therefore, defense counsel reasonably concluded that any objection to the prosecutor's comments upon that evidence during his closing argument would have been overruled. The net result would necessarily have been to have increased the jury's awareness of that evidence. It was not unreasonable for defense counsel to fail to make an objection, the net result of which would have been to highlight adverse evidence.

For the foregoing reasons, the Court is of the opinion that the Third Amended Petition for a Writ of Habeas Corpus should be dismissed.

Mr. Curry should prepare an order consistent with this opinion.

Yours truly,

/s/ Donald H. Kent
DONALD H. KENT

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF ALEXANDRIA

Law No. 7371-H.C.

WILBERT LEE EVANS,
Petitioner,

v.

TONI V. BAIR, SUPERINTENDENT,
Respondent.

ORDER

This proceeding came on to be heard on December 16, 1985 pursuant to this Court's order dated September 18, 1985 directing that an evidentiary hearing be held to determine claims II(a), II(h), and II(ff) of the third amended petition for a writ of habeas corpus, to the extent those claims allege a failure of counsel to call character witnesses at petitioner's guilt trial; claims II (g) and II(cc) to the extent those claims allege a failure of counsel to object to the admission of petitioner's statements at the guilt trial; and claims II(m), II(bb), and II(dd). All other claims in the third amended petition have been dismissed pursuant to this Court's order dated September 18, 1985. The petitioner appeared in person and by his attorneys Richard F. Goodstein and Jonathan Shapiro, and the respondent appeared by Donald R. Curry, Assistant Attorney General.

Upon consideration of the evidence presented at the hearing, and of the proposed findings of fact and conclusions of law submitted by the parties, the Court finds for the reasons stated in its letter opinion dated May 19, 1986, which is incorporated and made a part of this Order, that the petitioner is not entitled to habeas corpus

relief and that the claims set forth above should be dismissed.

For the foregoing reasons, the Court is of the opinion that the third amended petition for a writ of habeas corpus should be denied and dismissed; it is therefore,

ADJUDGED and ORDERED that the third amended petition for a writ of habeas corpus be, and hereby is, denied and dismissed, to which action of this Court the petitioner notes his exception.

It is also ORDERED that the transcript and record of the evidentiary hearing which was conducted on December 16, 1985, be made a part of the record in this case.

The Clerk is directed to forward a certified copy of this Order to the petitioner; to the respondent; to Richard F. Goodstein and Jonathan Shapiro, counsel for petitioner; and to Donald R. Curry, Assistant Attorney General.

ENTERED this 3rd day of June, 1986.

/s/ Donald H. Kent
Judge

I ask for this:

/s/ Donald R. Curry
Counsel for respondent

Seen and objected to:

/s/ Illegible
Counsel for petitioner

A COPY TESTE:

EDWARD SEMONIAN
Clerk

By: /s/ Illegible
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 26th day of February, 1987.

Record No. 860831

Circuit Court No. 7371-H.C.

WILBERT LEE EVANS,
Appellant,

against

TONI V. BAIR, WARDEN, ETC.,
Appellee.

From the Circuit Court of the City of Alexandria

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:

DAVID B. BEACH
Clerk

By: /s/ Debra A. Roman
Deputy Clerk

SUPREME COURT OF VIRGINIA

Record No. 811056

WILBERT LEE EVANS

v.

COMMONWEALTH OF VIRGINIA

Dec. 4, 1981

Stefan C. Long, E. Blair Brown, Alexandria, for appellant.

Jerry P. Slonaker, Asst. Atty. Gen. (Marshall Coleman, Atty. Gen., on brief), for appellee.

Before CARRICO, C.J., and HARRISON, COCHRAN, POFF, COMPTON, THOMPSON and STEPHENSON, JJ.

COCHRAN, Justice.

A jury found Wilbert Lee Evans guilty of capital murder as defined by Code § 18.2-31(f), in the willful, deliberate, and premeditated killing of a law-enforcement officer for the purpose of interfering with the performance of the officer's official duties.[1] In the second stage of the bifurcated proceeding conducted pursuant to the provisions of Code §§ 19.2-264.3 and -264.4, the same jury fixed Evans's punishment at death. After consider-

[1] The jury also found Evans guilty of using a firearm in the commission of a felony and fixed his punishment at confinement in the penitentiary for one year. The trial court entered judgment on that verdict, the judgment was not appealed, and the conviction is not pertinent to the present appeal.

ing the probation officer's report required by Code § 19.2-264.5, the trial court imposed the death sentence recommended by the jury. We have consolidated our automatic review of this sentence with Evans's appeal from his conviction, as authorized by Code §§ 17-110.1(A) and -110.1 (F), and we have given them priority on our docket in compliance with Code § 17.110.2. Evans asks us to reverse his conviction and remand the case for a new trial, or in the alternative to commute his death sentence to imprisonment for life.

I. Constitutionality of the Capital Murder Status.

Evans contends that Code § 19.2-264.4C [2] is unconstitutionally vague and overbroad in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution. He relies entirely, however, upon arguments that, as he concedes, we have recently rejected in *James Dyral Briley v. Commonwealth*, 221 Va. 563, 577-80, 273 S.E.2d 57, 65-67 (1980). We reaffirm our views expressed in that case. *See also Martin v. Commonwealth*, 221 Va. 436, 439-40, 271 S.E.2d 123, 125-26 (1980).

Evans also argues that Code § 19.2-264.2 [3] is facially unconstitutional. He adopts the arguments that, as he

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[2] § 19.2-264.4C provides as follows:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

[3] § 19.2-264.2. Conditions for imposition of death sentence.—In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death

further concedes, we rejected in *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979), and *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202 (1978), *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979). *See Stamper v. Commonwealth*, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), *cert. denied*, 455 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). We reaffirm our views expressed in those cases.

II. The Guilt Trial

The Commonwealth presented evidence that Evans, a prisoner, fatally shot Deputy Sheriff William Truesdale on January 27, 1981, while the officer was conducting him to jail in Alexandria. Evans admitted that he caused Truesdale's death with a firearm while the officer was engaged in the performance of his official duties. Evans consistently maintained, however, and so testified in his own defense, that he did not intend to kill Truesdale, and that the fatal shooting occurred accidentally while Evans was attempting to escape from police custody. Thus, the crucial question throughout the guilt trial was Evans's intent.

The uncontradicted evidence shows that Evans was in custody in North Carolina, that he volunteered to testify for the Commonwealth in a habeas corpus proceeding to be held in Alexandria, and that he was transported from North Carolina to Alexandria for that purpose. Noel I.

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shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Butler, Assistant Commonwealth's Attorney, who interviewed Evans in the Alexandria jail on January 26, 1981, found him cooperative, willing to testify, and able to provide testimony of value on behalf of the Commonwealth. On the following day, however, when Evans was brought into the courtroom to testify, he refused to do so, denied any knowledge of the case, and by his behavior caused the court to recess the proceeding.

Deputy Truesdale removed Evans and two other prisoners, Yvette Boone and Anthony Jasper, from the courthouse to jail in a van. Upon arriving outside the jail, the prisoners proceeded in a single file up the steps leading to the jail door, Boone in front, followed by Jasper and then Evans. Jasper's right hand was handcuffed to Evans's left. As Jasper entered the door, Evans began to grapple with Truesdale on the steps. Evans, gaining possession of Truesdale's revolver, shot the officer in the chest from a distance of not more than one-half inch, pointed the weapon at Jasper but did not fire, freed himself by shooting open the handcuffs, and fled on foot. Running through a nearby law office, Evans threatened a secretary with the revolver before continuing the flight. Surrounded by pursuing officers in a nearby parking lot, Evans shot himself, inflicting a superficial wound, and was retaken into custody.

Several inmates of the Alexandria jail were called as witnesses for the Commonwealth to testify to certain inculpatory statements made by Evans. Before these witnesses testified, Evans objected to any reference they might make to charges pending against him in North Carolina on which he had not been convicted. The court overruled the objection on the ground that such evidence would be admissible to show Evans's intent or state of mind.

Ralph Washington, an inmate, testified that Evans told him the night before the shooting that he was in Alexandria to testify in a case but that he was not going

to say anything, that what he wanted was to "get the 'hell out." Evans asked Washington about jail security, what court was like, whether the guards carried guns, and whether he could wear civilian clothes to court. He asked another inmate about a good place to run if he escaped. Washington testified that Evans stayed up all night and "was like he was getting ready to go to war." Washington's testimony continued as follows:

> "A. He said he'd already come down; he was already facing life and he ain't got nothing to lose. He said he was going to try any means possible to escape.
>
> "Q. To what steps would he go?
>
> "A. Anybody that gets in his way to stop him, he would take him out.
>
> "Q. Take him out? What does than mean?
>
> "A. I guess kill them."

At this time the court cautioned the jury as follows:

> "Members of the jury, the statements of the defendant are being admitted into evidence not to show his legal situation in the State of North Carolina, but rather to show his state of mind or intention at the time he made the statements. You should consider those statements only in that respect."

Yvette Boone testified that she was brought from jail in North Carolina to the Alexandria jail to testify as a witness in the same case in which Evans was expected to testify. While they were still in jail in North Carolina, Evans attempted to coach her in preparation for her appearance in court. He also informed Boone that when he went to court he was going "to run." In Alexandria, before Boone testified at the hearing, Evans told her that he had come not to testify but to escape. She, Jasper, and Evans were the prisoners being taken back to jail when Deputy Truesdale was shot. She saw Truesdale and Evans "tussling on the steps," but she was inside the jail door when she heard the shots fired.

Anthony Jasper testified that he occupied the same cell with Evans the night before the shooting, and Evans said that he had come to Alexandria "to try to escape." He asked Jasper the way to run to get to Washington, D.C. "He said he ain't got nothing to lose, you know . . . . He had two life sentences, something like that." The trial court promptly cautioned the jury that these statements were admitted only to show Evans's state of mind when he made the statements and not to prove whether he was facing punishment in North Carolina.

Jasper also testified that he and Evans were handcuffed together on the trip back to jail from the courthouse. Evans asked him whether Truesdale carried a weapon. Jasper had climbed the steps and was entering the jail door when Evans "yanked" him back. He saw Evans and Truesdale struggling over the handgun in Evans's hand. Evans had the gun in the air when Truesdale put his hand on it. Evans said, "Let me go or I'll kill your ass." Then the revolver "came down toward his side and he pulled the trigger." Evans then put the gun to Jasper's head, Jasper protested, and Evans shot the handcuffs off and fled.

Evans, testifying in his own defense, insisted that he had no intent to escape until he saw that Deputy Truesdale was off balance on the jail steps and decided to "run past him." He seized Truesdale's gun to "shoot the handcuffs off." He denied any intention of shooting the officer but asserted that he shot him accidentally while firing at the handcuffs.

Evans concedes that evidence was admissible to show that he planned in North Carolina to escape in Virginia and that, if necessary, he would kill anyone who stood in his way. He argues, however, that the trial court erred in admitting evidence that he was awaiting trial in North Carolina on charges for which he faced one or more life sentences. He relies upon the general rule recently restated in *Moore v. Commonwealth*, 222 Va. 72, 76, 278

S.E.2d 822, 824 (1981), that evidence of other offenses is inadmissible to prove guilt of the crime for which the accused is on trial. But this general rule, as we have frequently stated, is subject to numerous exceptions. Thus, evidence of other offenses is admissible to show motive or intent or to negate the possibility of accident. *Id.* at 76, 278 S.E.2d at 824-25. *See Brooks v. Commonwealth*, 220 Va. 405, 407, 258 S.E.2d 504, 506 (1979); *Kirkpatrick v. Commonwealth*, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970); *Williams v. Commonwealth*, 128 Va. 698, 711-12, 104 S.E. 853, 860-61 (1920).

Here, the trial court exercised commendable caution in twice instructing the jury during the guilt trial that the statements made by Evans in reference to charges pending against him in North Carolina were admitted into evidence solely for the purpose of showing his intent or state of mind. We hold that the statements were properly admitted for that purpose. The jury could reasonably infer that a prisoner held on charges for which he might be sentenced, upon conviction, to imprisonment for life would have a far more compelling motive for attempting to escape by force and violence than one held on charges for which he could receive only a lesser punishment.

We conclude that the trial court committed no error in its conduct of the guilt trial.

III. The Sentence Proceeding.

At the sentence proceeding which immediately followed the determination of guilt, the Commonwealth presented the testimony of one witness, Officer Louis Pough, of the Alexandria Police Department. Pough testified that he had a conversation with Evans after the Truesdale shooting, and Evans was "concerned about returning to North Carolina on other charges." Evans told Pough that "it mattered not to him who was in his way," that he was from the District of Columbia and he "would try to escape again or be killed at home." Counsel for Evans ob-

jected to Pough's testimony about North Carolina charges and moved for a mistrial. The court overruled the motion but cautioned the jury to disregard the reference to "other charges" pending in North Carolina.

The other evidence presented at this proceeding consisted of Commonwealth Exhibits 19, 20, and 21, showing several of Evans's convictions in North Carolina and the sentences imposed thereon as follows:

February 21, 1964	—Breaking, entering and larceny	—6 months
July 30, 1964	—Assaulting a police officer with a knife while the officer was in the performance of his duties	—6 months on road
July 30, 1964	—Engaging in an affray with a knife	—6 months on road to run consecutively with other sentence of same date
September 30, 1964	—Engaging in an affray with a deadly weapon	—4 months
December 15, 1970	—Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	—60 days
July 12, 1972	—Escape from North Carolina Prison System	—3 months
September 27, 1972	—Assault with a deadly weapon inflicting serious injuries	—not less than four years nor more than five years

Included in the jury instructions, all of which were unchallenged on appeal, was Instruction No. 14 [4] stating

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[4] "INSTRUCTION NO. 14

"THE COURT INSTRUCTS THE JURY THAT:

"You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant

in the alternative what the Commonwealth had to prove before the jury could fix Evans's punishment at death. After retiring to consider its verdict, the jury propounded two questions to the court, first, whether Evans's "past criminal record," to which Instruction No. 14 referred, included all the evidence "offered before and after the verdict," and second, whether Officer Pough's testimony could be considered as part of Evans's record. The court answered both questions in the negative and further instructed the jury that the only evidence of Evans's past criminal record which it could consider was contained in Exhibits 19, 20, and 21. Subsequently, the jury returned its verdict finding "after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society," and fixing Evans's punishment at death.

Evans contends that the trial court erred in overruling his motion for a mistrial made when Officer Pough re-

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shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

"(1) *That, after consideration of his past criminal record there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society;* or

"(2) That his conduct in commiting the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

"If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death.

"If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment." (Emphasis added).

ferred to other charges pending against Evans in North Carolina. There is no merit in this contention. The jury was aware that Evans faced charges in North Carolina because of references thereto properly admitted in the guilt trial to show his motive or intent. The trial court, however, expressly directed the jury to disregard the reference to North Carolina charges in considering the appropriate punishment to be imposed upon Evans. The court further instructed the jury, in answer to its questions, that Evans's past criminal record was limited to convictions shown in Exhibits 19, 20, and 21 and did not include anything revealed by Officer Pough's testimony.

We perceive no prejudice to Evans resulting from Pough's testimony, but if there was any prejudice, it was eliminated by the trial court's decisive corrective action. *See Stamper v. Commonwealth*, *supra*, 220 Va. at 277, 257 S.E.2d at 820, *Lewis v. Commonwealth*, 211 Va. 80, 83, 175 S.E.2d 236, 238 (1970). We hold, therefore, that the trial court did not err in overruling Evans's motion for a mistrial.

Code § 19.2-264.5 [5] authorized the trial court after considering the report of the probation officer, "and upon good cause shown," to commute the death sentence of Evans to imprisonment for life. The report, however, was damaging rather than helpful to Evans. It showed that he had a criminal record more extensive than that introduced into evidence in Exhibits 19, 20, and 21, an

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[5] § 19.2-264.5. Post sentence reports.—When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

unsatisfactory prison record, and an employment history which included acts of violence.

In 1968, a District of Columbia court sentenced Evans to serve a total of 720 days for assault and petit larceny. During his incarceration he received four disciplinary reports, including one for fighting. One former employer in the District of Columbia reported that in 1979 he refused to rehire Evans after Evans had "choked" a waitress during an argument. Several other former employers gave unfavorable reports about his work habits and behavior, but two reported that he was a good worker. His prison record in North Carolina revealed that seven disciplinary reports, one for unauthorized possession of a weapon, were filed against him from February 10, 1973, through September 28, 1975. Other convictions in North Carolina not listed in Exhibits 19, 20, and 21 included one in 1962 for assault with a deadly weapon, with a six months sentence suspended, one in 1965 for assault and battery, disorderly conduct, resisting arrest, and breaking arrest, with a six months sentence, and one in 1967 for assault and battery, with a thirty days sentence.

By order entered June 1, 1981, the trial court sentenced Evans to death in accordance with a jury verdict. Thereafter, Evans filed a motion to set aside the verdict of the jury and grant him a new trial. The trial court overruled the motion. As to the guilt trial, Evans based his motion upon the admission into evidence of the testimony of Washington and Jasper relating his statements about charges pending against him in North Carolina. Having held that this testimony was admissible, we hold that the trial court properly overruled Evans's motion insofar as it was based upon this ground. As to the sentence proceeding, Evans based his motion upon the alleged prejudicial effect of Officer Pough's testimony that Evans referred to the pending North Carolina charges. Having held that the trial court did not err in overruling Evans's motion for a mistrial based upon the same

ground, we hold that the court did not abuse its discretion in overruling the post-trial motion insofar as it was based upon this ground.

We conclude that the trial court committed no error in its conduct of the sentence proceeding.

IV. Appellate Review of the Death Sentence.

Under the mandate of Code § 17.110.1 [6] we review the death sentence imposed upon Evans in the trial court. Evans contends that the sentence should not be affirmed because the evidence is insufficient to show either of the statutory prerequisites to its imposition. He argues that his past criminal record, as presented to the jury, fails to establish that there is a probability that he will commit criminal acts of violence that would constitute a continuing threat to society, and that there is no evidence that his killing of Truesdale was outrageously or wantonly vile, horrible, or inhuman. Therefore, he says, the death sentence is excessive and disproportionate to the penalty imposed in similar cases, and the jury must have been influenced by passion, prejudice, or other arbitrary factors.

The jury based its verdict in the sentence proceeding exclusively upon its finding that Evans had a proclivity for violence that made him a menace to society. Accordingly, we will assume, as the jury indicated by its ver-

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[6] Code § 17-110.1 provides in pertinent part:

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death; or

2. Commute the sentence of death to imprisonment for life.

dict, that Evans' conduct in killing Truesdale was not outrageously or wantonly vile, horrible or inhuman within the purview of Code § 19.2-264.4C. Therefore, cases cited by Evans, such as *James Dyral Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980), *Linwood Earl Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48 (1980), *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *Giarratano v. Commonwealth*, 220 Va. 1064, 266 S.E.2d 94 (1980), and *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), involving murders of exceptional atrociousness, are inapposite.

In *Stamper v. Commonwealth, supra*, the defendant was sentenced to death for each of three capital murders committed during an armed robbery. In two of the murders the jury's verdict fixing punishment at death was based entirely upon the defendant's proclivity for violence. His criminal record showed that he was sentenced in 1972 to serve twenty years in the penitentiary for a 1971 armed robbery and twelve months in jail for unauthorized use of an automobile, and was sentenced in 1974 to six months in jail as an accessory after the fact to an escape from the penal system. He was released on parole in 1976 and committed the triple murders in 1978. A victim of the 1972 armed robbery testified that he was shot by Stamper and permanently disabled during the commission of that crime. We upheld the imposition of the death sentence for each of the three capital murders.

In the present case, Evans had a criminal record extending back to his youth showing a consistent pattern of aggression, bellicosity, and violence. Although only the last conviction presented to the jury, that of September 27, 1972, for assault with a deadly weapon inflicting serious injuries, resulted in imposition of a substantial prison sentence, there were other convictions for offenses in which Evans used a deadly weapon. One of these offenses was assaulting a police officer with a knife while the officer was in the performance of his duties. Another offense was escaping from the North Carolina prison system.

The jury could consider Evans's past criminal record together with the circumstances surrounding the commission of the Truesdale murder in determining whether he would probably commit other crimes of violence. *Smith v. Commonwealth, supra*, 219 Va. at 478 and n.4, 248 S.E.2d at 149. There was evidence that Evans came to Virginia with the single-minded purpose to escape, that he planned to kill, if necessary, any person who attempted to prevent his escape, and that, after fatally shooting Truesdale, he reaffirmed his intention to escape even if this meant that he would kill again or be killed. We hold that this evidence, which fitted into the pattern of violent conduct revealed by his past criminal record, was sufficient to support the jury's finding that he would be a continuing threat to society.

In its review of the case, the trial court, of course, had the benefit of a more extensive and detailed record of Evans's past criminal convictions not only in North Carolina but also in the District of Columbia, as well as his prison record and employment history. Thus, the trial court had additional information, not available to the jury, justifying the court's refusal to commute the punishment of death fixed by the jury to imprisonment for life.

We find no evidence that the jury verdict and the trial court's review thereof were influenced by passion, prejudice, or any other arbitrary factor. To the contrary, the record reflects careful, conscientious, and objective determinations made successively by jury and trial judge.

We have stated that if juries generally in this jurisdiction impose the death sentence for comparable crimes, then the sentence is not excessive or disproportionate even though a codefendant or another accused may have received a lesser sentence. *Coppola v. Commonwealth*, 220 Va. 243, 259, 257 S.E.2d 797, 808 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980), applied in *Stamper v. Commonwealth, supra*, 220 Va. at 283, 257 S.E.2d at 824. In *Martin v. Commonwealth*, 221

Va. 436, 271 S.E.2d 123 (1980), the only other appeal presented to us in which a defendant was sentenced to death for murdering a police officer in violation of Code § 18.2-31(f), we reversed the conviction and remanded the case for a new trial because of error in selection of the jury. Therefore, we have no comparable cases to consider in determining whether the death sentence imposed upon Evans is excessive or disproportionate.

After carefully considering the record in this case, we hold that the sentence is not excessive or disproportionate. We have no hesitancy in concluding that juries generally in this jurisdiction will impose the death sentence for comparable crimes where inmates who kill prison guards have criminal records showing consistently turbulent, combative conduct and the probability of committing criminal acts of violence that will threaten the peace and security of the law-abiding public.[7] Accordingly, we will affirm the sentence of death.

Affirmed.

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[7] For more than a century prior to enactment of Code § 18.2-31(c) by Acts 1975, chs. 14 and 15, the death sentence was mandatory for an inmate who killed a prison guard. Acts 1843-44, c. 72, and successor statutes. Juries imposed the punishment required under these statutes, *e.g.*, *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871); *Brown v. Commonwealth*, 132 Va. 606, 111 S.E. 112 (1922); *Hart v. Virginia*, 298 U.S. 34, 56 S.Ct. 672, 80 L.Ed. 1030 (1936) (appeal denied by this Court, Supreme Court held there was no substantial federal question); *Jefferson v. Commonwealth*, 214 Va. 747, 204 S.E.2d 258 (1974); *Washington v. Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975); *Lewis v. Commonwealth*, 218 Va. 31, 235 S.E.2d 320 (1977).

Until alternative punishment was added by Acts 1914, c. 240, the single sanction in Virginia for murder of the first degree was death. Juries imposed the death sentence both before and after the 1914 amendment for first degree murder of a police officer, *e.g.*, *Davis v. Commonwealth*, 89 Va. 132, 15 S.E. 388 (1892); *Gray v. Commonwealth*, 150 Va. 571, 142 S.E. 397 (1928); *Delp v. Commonwealth*, 172 Va. 564, 200 S.E. 594 (1939).

FROM THE CIRCUIT COURT
OF THE CITY OF ALEXANDRIA

Wiley R. Wright, Jr., Judge

PRESENT: All the Justices

Record No. 840474

WILBERT LEE EVANS

v.

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE A. CHRISTIAN COMPTON

November 30, 1984

This is the automatic, priority review of a sentence to death. Previously, upon similar review, we affirmed an earlier death sentence imposed on the defendant for the same crime. Subsequent to the affirmance, the defendant instituted a state habeas corpus proceeding. As the result of information developed in the habeas case, the Commonwealth confessed error and the first death sentence was set aside. Following a resentencing proceeding, the present death sentence was imposed. The principal issue in this appeal is whether defendant's sentence should be vacated because of the alleged violation of the *ex post facto* clauses of the state and federal constitutions.

The chronology sets the stage. On January 27, 1981, Wilbert Lee Evans, a prisoner, fatally shot a deputy sheriff who was escorting him to jail in Alexandria. About four months later, a jury convicted defendant of capital murder in the willful, deliberate, and premedi-

tated killing of a law-enforcement officer for the purpose of interfering with the performance of the officer's official duties. Code § 18.2-31(f). In the sentencing phase of the bifurcated trial, the same jury recommended the death penalty, based solely upon a finding of "future dangerousness." The Commonwealth relied mainly on records of seven purported out-of-state convictions of defendant. The jury determined that after consideration of Evans' prior history, there was a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. *See* Code § 19.2-264.4(C). On June 1, 1981, the trial court sentenced defendant to death.

On October 16, 1981, in the case of *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981), we commuted a defendant's death sentence to imprisonment for life. There, we held that the lower court had failed, in the penalty phase of that bifurcated trial, to preserve fully the defendant's right to a fair and impartial jury. There was no error in the guilt phase of the trial but the sentence to death was invalidated. We further decided that the statutory framework existing at the time inhibited a remand of the case for a new trial limited to the penalty issue only. This was because Code § 19.2-264.3(C) provided at the time that if a defendant was found guilty by a jury of a capital offense, the *same* jury must fix the punishment. We said: "Manifestly, the same jury that convicted Patterson should not now be reconvened upon a remand." 222 Va. at 660, 283 S.E.2d at 216.

On December 4, 1981, we affirmed Evans' conviction and sentence to death. *Evans* v. *Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981). About four months later, the Supreme Court of the United States denied defendant's petition for a writ of certiorari 455 U.S. 1038 (1982).

Within a month, in April of 1982, defendant filed a petition for a writ of habeas corpus in the trial court. In May and December of 1982, defendant filed amendments to the habeas corpus petition to reflect new claims. In the May amendment, the defendant alleged that at least two of the seven purported North Carolina convictions relied on by the prosecutor during the penalty phase of defendant's trial actually were not convictions at all. The defendant alleged that one charge, assault on a police officer with a deadly weapon, had been dismissed after an appeal. He asserted that another charge, engaging in an affray with a knife, also had been appealed. In a trial *de novo* on that charge, defendant was again convicted, but the record used in his capital murder trial listed both convictions for use of the knife and no attempt was made to explain this duplication to the jury.

Effective March 28, 1983, emergency legislation adopted by the General Assembly was approved amending the relevant death penalty statutes because of the *Patterson* decision. Code § 19.2-264.3 was amended to provide that "[i]f the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty." Acts 1983, ch. 519.

About two weeks later, an Assistant Attorney General of Virginia wrote a letter to the trial judge confessing error in the defendant's sentencing proceeding and acknowledging that Evans' death sentence should be vacated. The April 12, 1983 letter indicated that "unbeknownst to the prosecution or defense counsel at the trial" many of the records of convictions were "seriously misleading" or "otherwise defective." It had been discovered that not only were three purported convictions actually one but several of the other convictions were obtained when Evans apparently had appeared without counsel. On May 2, 1983, the trial court entered an order

setting aside defendant's death sentence and granting a hearing to determine whether defendant should be resentenced or his sentence reduced to life imprisonment.

On September 21, 1983, an evidentiary hearing was held and, by order entered October 12, 1983, the trial court denied defendant's motion to bar the Commonwealth from again seeking the death penalty. On January 30, 1984, the trial court impanelled a new jury for a resentencing hearing, in accordance with amended Code § 19.2-264.3. At the conclusion of the hearing, the jury fixed punishment at death. On March 7, 1984, the trial court entered the order appealed from imposing the death penalty.

We shall address the issues in the order presented by the defendant. They involve the *ex post facto* violation, two claims of prosecutorial misconduct, double jeopardy, misdirection of the sentencing jury, and denial of equal protection. The relief sought by the defendant is either a reversal of the trial court's decision which allowed resentencing and replacement of the sentence of death with a sentence of life imprisonment, or, commutation of his sentence to life imprisonment, or, remand of the case to the trial court for a new sentencing hearing.

Defendant contends that application of the revised sentencing law to him violates the prohibition against *ex post facto* laws. According to Evans, the *Patterson* decision made clear, until Virginia's death penalty statutes were amended by emergency legislation on March 28, 1983, that this Court had but two options in reviewing a sentence of death. The Court could affirm the sentence to death or commute the sentence to life imprisonment. A remand for resentencing in the case where the original jury was "tainted" was not possible, the defendant argues. Accordingly, Evans says, under the law as it existed at the time he committed his offense, at the time he was tried, at the time his first conviction was affirmed, and at all times before approval of the emer-

gency legislation, he was entitled to a sentence of life imprisonment upon the setting aside of his death sentence. He argues that as the result of *Patterson*: "Automatic commutation in such situations thus became a part of Virginia's law just as surely as if it had been drafted by the legislature."

Evans contends that had the errors which led to the Commonwealth's confession of error been brought to our attention at the time of his first appeal, we would have done precisely in *Evans* what we had done seven weeks previously in *Patterson*, and Evans would have received a life sentence. He contends the considerations which led the Court to commute Patterson's sentence, that is, the impropriety of recalling Patterson's improperly selected jury, applied with full force to Evans' case. His jury had been irreparably "tainted" by exposure to at least five invalid convictions, he says. Defendant concludes that it was error of constitutional dimension to try him under a revised sentencing scheme which was not in effect until more than a year after his conviction was final, "and which replaced his statutory right to a life sentence with the renewed prospect of death." We reject defendant's contentions and conclude that there has been no *ex post facto* violation.

Whether a defendant has a "right," or is "entitled," to a life sentence if his death sentence is set aside is irrelevant in an *ex post facto* analysis. "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981). Pertinent to the *ex post facto* inquiry is whether the defendant had "fair warning as to the degree of culpability which the State ascribed to the act of murder." *Dobbert* v. *Florida*, 432 U.S. 282, 297 (1977); *Smith* v. *Commonwealth*, 219 Va. 455, 475, 248

S.E.2d 135, 147 (1978), *cert. denied*, 441 U.S. 967 (1979). Manifestly, Evans had "fair notice" and "fair warning" at the time of his 1981 offense that the capital murder of a law-enforcement officer was a crime for which the death penalty could be imposed. Code §§ 18.2-31(f) and 18.2-10(a). Virginia's view of the severity of capital murder and of the degree of punishment which the General Assembly wished to impose upon capital murderers had been clearly announced before Evans' criminal conduct occurred.

Defendant argues in rebuttal, however, a full "fair warning" inquiry must take into account that Evans was also deemed to understand that if he were to receive a death sentence and if his death sentence were to be set aside, his punishment would be life imprisonment. Defendant notes the following statement in *Weaver*: "Thus, even if a statute merely alters penal provisions . . . it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." 450 U.S. 30-31 (footnote omitted). He contends it was improper to impose a more onerous sentencing procedure upon him than was in place at the time of his crime.

There are at least two answers to this contention. First, according to *Dobbert*, the *ex post facto* inquiry focuses on "the quantum of punishment attached to the crime," 432 U.S. at 294, of which the defendant had notice at the time of the offense, and not on adjustments in the method of administering that punishment that are collateral to the penalty itself. Second, the satutory amendment was not "more onerous" than the prior law; it was "ameliorative" and hence not *ex post facto*. 432 U.S. at 294; *Smith* v. *Commonwealth*, 219 Va. at 475, 248 S.E.2d at 147. As the Attorney General points out, "[t]he change insures that an accused, who has been fairly tried and convicted of capital murder, also receives a fair and impartial trial on the issue of punishment." Where, as here, there has been a judicial deter-

mination that a sentence to death is invalid because of error during the penalty stage, the new law provides for impanelling a new jury, free of any taint arising from errors during the first trial, to redetermine the defendant's punishment. A defendant convicted of capital murder is entitled to a fair and impartial determination of his punishment; he will not be heard to complain that a change in the law which protects that right is not wholly beneficial to him.

Kring v. *Missouri*, 107 U.S. 221 (1882), heavily relied on by defendant, is not controlling. There, at the time of the offense, an accused convicted in Missouri of second-degree murder was thereby acquitted of first-degree murder. Prior to Kring's trial, the Missouri Constitution was amended to provide that an accused could be retried for first-degree murder, notwithstanding his earlier conviction and sentence for murder in the second degree. Kring pled guilty to second-degree murder. On appeal, the conviction was reversed because of a breached plea agreement. Upon retrial, Kring was convicted of first-degree murder. The second conviction was reversed by the Supreme Court because the change in law operated *ex post facto*. The Court held that the new constitutional provisions eliminated what was, by the law of the state when the crime was committed, an absolute defense to the charge of first-degree murder. 107 U.S. at 229. Unlike the present case, the new law in *Kring* abrogated a substantial right which existed at the time of the offense. In contrast, Evans has been deprived of no substantial right.

Next, defendant contends the Commonwealth's Attorney knowingly used false evidence to obtain the original sentence to death and that such conduct so violated fundamental fairness and due process as to bar a subsequent sentencing proceeding. This claim focuses on the flawed record of defendant's prior convictions.

The trial judge conducted a full investigation into this charge at the hearing on September 21, 1983. At the conclusion of the hearing, the court found from the evidence "that the defendant has failed to prove to the satisfaction of the Court that the prosecution engaged in such misconduct or tactics as to warrant the Court in concluding that the Commonwealth is precluded from again seeking the death penalty in this case." Although our review of the record convinces us that credible evidence supports the trial court's finding of fact, we will agree with defendant and assume, without deciding, that the Commonwealth's Attorney's handling of this particular phase of the original trial involved serious prosecutorial misconduct. Nevertheless, the defendant is not entitled to the relief he seeks.

In *United States* v. *Morrison*, 449 U.S. 361 (1981), the Supreme Court unanimously held that governmental action which involved "deliberate" and "egregious" conduct did not warrant dismissal of an indictment, absent a showing of "demonstrable prejudice, or substantial threat thereof. . . ." 449 U.S. at 365, 367. The Court indicated that a "drastic remedy" would be imposed only where the conduct could not be corrected by "traditional remedies." 449 U.S. at 365-66, n.2.

In the present case, the defendant has received, by a different jury, a new, full sentencing trial, free of flawed conviction records. This traditional remedy has been wholly adequate to remove any prejudice to the defendant caused by any prosecutorial misconduct during the penalty phase of his first trial.

In arriving at this conclusion, we do not condone the indifferent, careless manner in which introduction of the documentary records of defendant's prior convictions was handled by the prosecutor. During the hearing, the Commonwealth's Attorney admitted he knew, at the time the conviction records were proffered during the trial, that three of the purported convictions actually were only one.

He testified, however, that he advised defense counsel of the discrepency [sic] during the trial, and that he assumed the error would be explained to the jury by defense counsel during closing argument.

The records in dispute covered convictions in Wake County, North Carolina, during the period 1964-1972, as noted in our opinion in *Evans*, 222 Va. at 774-75, 284 S.E.2d at 820. Apparently, most of the pre-1972 conviction records in that county had been destroyed. And, admittedly, the package of North Carolina documents available at trial was a "most incredible mess["], according to the hearing testimony of defendant's trial counsel. Also, the evidence shows that the prosecutor had furnished defense counsel with some conviction information prior to trial and that defense counsel had travelled to North Carolina prior to trial to examine records of defendant's convictions. And, we recognize there was the factual dispute concerning whether the prosecutor notified defense counsel, during the trial, about the inaccurate records. Nevertheless, the flawed documents were proffered by the Commonwealth's Attorney, who had the duty to assure, as far as reasonably possible, that the records were accurate. If their correctness was in doubt, or if the prosecutor knew they were inaccurate in any particular, the documents should not have been offered in evidence.

Next, the defendant asserts that the Commonwealth's "purposeful delay" in conceding error in the defendant's original sentencing proceeding until the new statutory scheme was enacted, violated defendant's due process right. We do not agree.

The trial court stated at the conclusion of the September 1983 hearing: "I think the record is absent any showing that there was any maneuvering by the Attorney General or otherwise to put this case in position where, by some design, it would be cured by pending legislation." In the order entered after the hearing, the trial court stated that "the evidence fails to prove by a preponder-

ance of the evidence that the Commonwealth purposefully and wrongfully delayed resolution of the defendant's petition for a writ of habeas corpus in order to achieve a tactical advantage as alleged by the defendant. . . ." The record amply supports the trial court's finding that there was no "purposeful delay" connected with the timing of the confession of error.

The Assistant Attorney General charged with handling defendant's first appeal and the habeas corpus proceeding testified in detail at the September 1983 hearing. In essence, he testified no effort was made within the office of the Attorney General to delay a confession or error in Evans' case until the amendatory legislation was approved. That evidence is credible, uncontradicted, and persuasive. The trial court examined *in camera* original files of the Governor's office and the Attorney General's office relating to drafting, introduction, consideration, and approval of the corrective legislation. No evidence to support defendant's claim was found by the trial court as the result of that examination. We have conducted a similar examination of those records and have confirmed the trial court's conclusion. Accordingly, there is no merit to defendant's claim of wrongful conduct.

Next, defendant contends that resentencing violated the prohibition against double jeopardy, under the facts of this case. Relying on *Bullington* v. *Missouri*, 451 U.S. 430 (1981), defendant argues that principles of double jeopardy bar resentencing him to death, after his original death sentence was set aside by the habeas corpus court. *Bullington* is inapposite. There, a defendant was convicted of capital murder, but the jury sentenced him to life imprisonment rather than death, under Missouri's bifurcated trial procedure. Defendant obtained reversal of the conviction and a new trial. The Supreme Court barred a second attempt to impose the death penalty and ruled: "Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or

innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial." 451 U.S. at 446. But the obvious difference between that case and this is, in the present case, defendant has not been acquitted by a jury with respect to the death penalty.

In addition, the sentence to death in this case was set aside upon the ground of trial error and not evidentiary insufficiency. The defendant's sentence was annulled merely because the judicial process was defective, that is, evidence was received that should not have been offered. Accordingly, double jeopardy principles have not been offended. Under these circumstances, the accused has a strong interest in obtaining a fair readjudication of his punishment free from error, just as society maintains a valid concern for insuring that the guilty are punished and properly sentenced. *Burks* v. *United States*, 437 U.S. 1, 15 (1978).

Next, the defendant contends the trial court's instruction to the jury in the resentencing proceeding, that a sentence to life imprisonment required a unanimous vote of the jury, was contrary to the Virginia statutes and violated defendant's due process rights. Defendant dwells on the wording of the verdict forms contained in Code § 19.2-264.4(D). There, the death-penalty form requires the jury to "unanimously fix [defendant's] punishment at death," subsection (D)(1), while the life-imprisonment form merely concludes that the jury may "fix his punishment at imprisonment for life," subsection (D)(2). Defendant argues omission of the word "unanimously" from the life-sentence form demonstrates a legislative intent that a verdict of life imprisonment need not be unanimous. Accordingly, the defendant urges, the trial court erred in responding to a question from the jury and in specifying a requirement of unanimity for a life sentence. There is no merit to this contention.

Under established Virginia law, the verdict in all criminal prosecutions must be unanimous. *See* Rule 3A:17(a). And we perceive no legislative intention to change that rule by virtue of the language of Code § 19.2-264.4(D). Any possible ambiguity created by the omission of the word "unanimously" from subsection (D)(2) of § 19.2-264.4 is resolved by subsection (E) of the statute, which specifies: "In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Implicit in subsection (E), given our established law on unanimous criminal verdicts, is the conclusion that the jury must unanimously agree on both "the penalty" of death and "the penalty" of life imprisonment.

Finally, defendant asserts that sentencing him to death, when "all others" similarly situated with respect to the amended death penalty statutes received life sentences, deprived him of due process and equal protection under the Fourteenth Amendment to the United States Constitution and was fundamentally unfair. He contends that had the "grave errors which eventually caused the Commonwealth to concede the invalidity of Evans' death sentence been brought to this Court's attention at the time of his original appeal, his sentence of death would have been set aside." He says "there was simply no reason" to treat Evans differently from Patterson, whose case was decided only weeks prior to Evans' appeal. He contends that if he is now to receive the death penalty, while Patterson, "and perhaps others," did not, he will be denied the equal protection of the laws to which he is entitled. We disagree.

As the defendant points out, equal protection requires that similarly situated individuals be treated alike and that, because non-suspect classification is involved here, the classification "rationally advances a reasonable and identifiable government objective." *Schweiker* v. *Wilson*, 450 U.S. 221, 235 (1981). We hold that Evans is not

similarly situated with the defendant in *Patterson* with respect to the amendment to the death penalty statutes.

Virginia's current capital murder statutory framework became effective July 1, 1977. The amendment in question was approved and became effective March 28, 1983. Admittedly, both Evans and Patterson committed their crimes and were tried, convicted, and sentenced to death prior to the effective date of the amendment. Nevertheless, there is a significant difference between Patterson's case and Evans' case. Patterson's sentence to death was commuted to life imprisonment before the effective date of the statutory amendment; Evans' penalty was not set aside, and his resentencing trial did not commence, until after the effective date of the amendment.

As the Attorney General contends, Evans, in effect, asks us to decide that any defendant who originally was convicted and sentenced to death before the effective date of the amendment, must have the death sentence commuted to a life sentence *at any time* the death sentence is set aside. This would be the rule whether the death sentence was voided one day or twenty years after the effective date of the amendment. A state properly may draw the line at some point between those persons whose cases had progressed sufficiently far in the legal process to be governed by the old law and those individuals whose cases could properly subject them to the amended law. *Dobbert* v. *Florida*, 432 U.S. at 301. Because the subject statutory change affects only the procedures to be followed if a death sentence is set aside, we deem it more rational to classify individuals potentially affected by the change according to the time when the individual's death sentence was set aside, and the resentencing proceeding commenced, rather than at the time when the person was originally tried and convicted.

In conclusion, Code § 17-110.1 requires this Court, in addition to any errors enumerated by appeals, to consider and determine whether the death sentence "was

imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Upon the issue of arbitrariness, the jury based its finding on the "future dangerousness" factor, which was supported fully by the evidence. Defendant's prior history revealed criminal convictions in the District of Columbia and North Carolina. In 1964, he threatened a police officer with a knife. In 1974, he threatened prison officials with a knife while demanding transfer to another prison facility. In 1978, he killed a person during an argument. In 1981, he assaulted and threatened credit union employees during an armed robbery.

The evidence regarding the present offense showed that Evans pretended to be a willing witness for the Commonwealth but that his sole purpose in cooperating was to engineer an escape after being brought to Virginia in custody from North Carolina. He planned to kill anyone who attempted to prevent his escape and he was acting on this intent when he killed the victim. In summary, we find that the sentence in this case was assessed by the jury free of the influence of passion, prejudice, or any other arbitrary factor.

Upon the issues of excessiveness and proportionality, our prior expression about Evans is as valid today as it was in 1981 when we decided his first appeal. "We have no hesitancy in concluding that juries generally in this jurisdiction will impose the death sentence for comparable crimes where inmates who kill prison guards have criminal records showing consistently turbulent combative conduct and the probability of committing criminal acts of violence that will threaten the peace and security of the law-abiding public." *Evans* v. *Commonwealth*, 222 Va. at 780, 284 S.E. 2d at 824.

For the foregoing reasons, we conclude that the trial court committed no error. In addition, we independently

have concluded from a review of the entire record that the sentence of death was properly assessed. Accordingly, the judgment below will be

Affirmed.

[SEAL]

COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL

April 12, 1983

The Honorable W. R. Wright, Jr., Judge
Circuit Court of Alexandria
520 King Street
Alexandria, Virginia 22314

R: Wilbert Lee Evans v. J. P. Mitchell, Warden, Virginia State Penitentiary (No. 7371)

Dear Judge Wright:

Among petitioner's numerous allegations are claims that the Commonwealth's sentencing exhibits which were presented to the jury, concerning his North Carolina convictions, were misleading, erroneous or otherwise inadmissible. Upon investigation of those records and in the interest of justice, the respondent is constrained to concede that Wilbert Evans' current death sentence cannot be sustained. His capital murder conviction, however, is valid. The Commonwealth's exhibits indicated the following convictions and sentences, as summarized by the Supreme Court of Virginia on direct appeal:

1. February 21, 1964	—Breaking, entering and larceny	—6 months
2. July 30, 1964	—Assaulting a police officer with a knife while the officer was in the performance of his duties	—6 months on road
3. July 30, 1964	—Engaging in an affray with a knife	—6 months on road to run consecutively with other sentence of same date

4. September 30, 1964	—Engaging in an affray with a deadly weapon	—4 months
5. December 15, 1970	—Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	—60 days
6. July 12, 1972	—Escape from North Carolina Prison System	—3 months
7. September 27, 1972	—Assault with a deadly weapon inflicting serious injuries	—not less than four years nor more than five years

As you know, Evans was sentenced to death *only* on the "future dangerousness" standard and not because of any "vileness" of the killing itself. *Evans* v. *Commonwealth*, 222 Va. 766 (1981). That is, the basis for the death sentence was solely that upon Evans' "past criminal record" the jury found there was "a probability that he would commit criminal acts of violence . . . [and] constitute a continuing threat to society." *Id.* at 776. Despite pretrial efforts by the Commonwealth's Attorney's Office and defense counsel to ascertain his correct record, it has now been determined that most of these North Carolina records—unbeknownst to the prosecution or defense counsel at the trial—were seriously misleading and/or otherwise defective. (See attached affidavit of Russell Nipper, Clerk of North Carolina courts.)

It is well established that a sentence imposed on the basis of assumptions concerning a criminal record which are materially untrue cannot be sustained. *See United States* v. *Tucker*, 404 U.S. 443, 447-448 (1972); *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948). Likewise, convictions at which the defendant was not represented by counsel cannot be used against him to enhance his

punishment at a subsequent trial. *See Baldasar* v. *State of Illinois*, 446 U.S. 222 (1980); *United States* v. *Tucker*, *supra*; *Burgett* v. *State of Texas*, 389 U.S. 109 (1967).

The North Carolina conviction designated herein as #2 was actually vacated by virtue of an appeal for a trial *de novo* in the Superior Court. Then the charge was "nol prossed." Also, the files in North Carolina indicate that Evans was not represented by counsel at those proceedings.

Convictions #3 and #4 were really one case—not two as indicated. The July 30, 1964 (#3) conviction was vacated for a trial *de novo* in the higher court. Conviction #4 (of September 30, 1964) was the result of that trial. Also, Evans had no attorney at either proceeding.

Finally, Evans was without counsel on convictions #5 and #6. Thus, as pointed out by Mr. Nipper, the North Carolina records reflect that Evans had counsel *only* on convictions #1 and #7.

Upon approval of the Court, I will draft a proposed order for Mr. Shapiro's endorsement to vacate the death sentence. Of course, it will be the Commonwealth's decision as to whether or not the Commonwealth should again seek the death penalty at a new sentencing proceeding. I anticipate having the order grant the Commonwealth ninety (90) days to commence such proceedings. Otherwise, a life sentence should be imposed in accordance with § 19.2-264.4A of the Code.

The Governor signed into law (effective March 28, 1983, as "emergency legislation") clarifying procedural amendments to §§ 17-110.1 and 19.2-264.3. These amendments expressly provide for another sentencing hearing *before a new jury* (or judge alone if all concur) in the event a death sentence is set aside or found invalid. A copy of this legislation is enclosed. As you know, the procedure for such a resentencing hearing is set forth in *Fogg* v. *Commonwealth*, 215 Va. 164 (1974); *Huggins*

v. *Commonwealth*, 213 Va. 327 (1972); and *Snider* v. *Cox*, 212 Va. 13 (1971).

Since this was a procedural change, in our judgment the new procedure would be applicable to Evans, if the Commonwealth again seeks the death sentence, and is not "*ex post facto*." *See Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977); *Knapp* v. *Caldwell*, 667 F.2d 1253, 1262-1263 (9th Cir. 1982). *See also Smith* v. *Commonwealth*, 219 Va. 455, 474-476 (1978).

Sincerely,

/s/ Jerry P. Slonaker
JERRY P. SLONAKER
Assistant Attorney General
Criminal Law Enforcement
Division

cc: Jonathan Shapiro, Esquire

The Honorable John Kloch
Commonwealth's Attorney
City of Alexandria

3:5/189
Enclosure

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA

vs.

WILBERT E. EVANS,
Defendant.

Alexandria, Virginia

Thursday, April 16, 1981

The trial reconvened at 9:30 o'clock a.m.

BEFORE:

THE HONORABLE WILEY R. WRIGHT, and a jury.

APPEARANCES:

JOHN E. KLOCH, Esq., Commonwealth Attorney.

RANDY SENGEL, Esq., Assistant Commonwealth Attorney.

STEFAN C. LONG, Esq., and E. BLAIR BROWN, Esq., 121 South Royal Street, Alexandria, Virginia, counsel for the defendant.

* * * *

[FROM DIRECT TESTIMONY OF
RALPH WASHINGTON]

[303] BY MR. KLOCH:

Q Did Mr. Evans tell you the purpose for which he was here?

A Yes.

[304] Q What did he tell you, why he was in Alexandria?

A To testify to a murder charge.

Q Against whom?

A He didn't say.

Q And what, if anything, did he tell you about what he was going to say in his testimony?

A He said he wasn't going to say anything. What he wanted to do was get the hell out.

Q What, if anything, else did he tell you about, essentially, escaping?

A How was jail security; what was court like; did the guards carry guns.

Q Did you hear him converse with other people in the cell block?

A Yes.

Q Was there any reference to whether he would wear civilian clothes or not?

A Yes.

Q What ~~did~~ he ask you or tell you about that?

A He asked did he have to wear civilian clothes to court and he was told you can wear civilian clothes if you want to.

Q Did he, in fact, do that?

[305] A Yes.

Q Did he talk to you with any reference to where he might go if he got out?

A Well, he asked Jasper, one of the inmates, you know, where was a good place to run if you did escape. He said over in one of the complexes.

Q One of the complexes?

A Yes.

Q Houses?

A Apartments and stuff right across from the jail.

Q Could you state whether or not there was any reference to, in the event he got out, about grabbing someone or kidnapping someone?

A He said he was going to try his best to escape, you know, and if he saw a car he was going to take it or whatever.

Q How long a time during this evening did you have a conversation, talk to him or listen to him?

A He stayed up all night and we got up at 6:00, and he stayed up all night until it was time to go to court. He was like he was getting ready to go to war. He kept pacing the floor, drinking coffee and stuff, just getting ready for the next day, what he was going to do.

[306] Q Did he sleep at all?

A No.

Q What, if anything, did he say about not having anything to lose?

A He said he'd already come down; he was already facing life and he ain't got nothing to lose. He said he was going to try any means possible to escape.

Q To what steps would he go?

A Anybody that gets in his way to stop him, he would take him out.

Q Take him out? What does that mean?

A I guess kill them.

THE COURT: Members of the jury, the statements of the defendant are being admitted into evidence not to show his legal situation in the State of North Carolina, but rather to show his state of mind or intention at the time he made the statements. You should consider those statements only in that respect.

MR. KLOCH. I have no other questions of this witness.

* * * *

[354] DIRECT EXAMINATION
[OF ANTHONY JASPER]

BY MR. KLOCH:

Q Mr. Jasper, I want you to please keep your voice up and speak slowly and loud enough so this gentleman back here can hear you. Please keep your voice up.

A All right.

Q Would you state your name.

A Anthony Jasper.

Q Mr. Jasper, you are now incarcerated in Alexandria Jail, are you not?

A Yes, I am.

Q Were you likewise incarcerated on the 26th and 27th of January this year?

A Yes, I was.

Q Did you have occasion to meet a person named Wilbert Evans?

A Yes.

Q Do you see him in court today?

A Yes.

Q Would you point to him and tell what color shirt he's wearing.

A Right. A light brown colored shirt.

Q How did you happen to meet him?

[355] A Were in the same cell.

Q And did you have occasion to engage in conversation with him?

A Yes, I had a little conversation with him.

Q Were other inmates in the same cell block with you?

A Yes, there was.

Q And one of the individuals was Mr. Washington?

A Yes.

Q What, if anything, did Mr. Evans say to you concerning why he was in Alexandria?

A He came up here to try to escape.

Q What did he talk about in terms of escape?

A He talked about, you know, the charge he had, you know.

Q All right.

Did he ask you anything about escaping?

A Yes.

Q What type of questions?

A Which way is D.C.

Q Excuse me?

A Which way was D.C., you know.

Q All right.

[356] What were his other questions?

A And he asked me which way could he run, you know, and should he go through the project, you know, to get to D.C.

Q All right.

Did he have occasion to tell you that he wanted to escape?

A He said he ain't got nothing to lose, you know.

Q Why?

A He had two life sentences, something like that.

THE COURT: Once again, ladies and gentlemen, the Court is not admitting these statements to prove the truth of the statement, but merely to show the state of mind of the defendant at the time the statements were made. You should not consider statements made by the defendant to prove whether or not he is facing a sentence in North Carolina or anything concerning his legal situation in the State of North Carolina. It's merely what his state of mind was at the time he made the statement.

MR. LONG: Note my objection.

THE COURT: Yes.

* * * *

EXCERPT FROM SUMMATION OF MR. KLOCH, COMMONWEALTH ATTORNEY

[543] We start out with motive. And why would Wilbert Evans come up here to escape and why would he go to the extent of killing someone to do it? Two witnesses said he had nothing to lose; he'd killed people in North Carolina; he'd absolutely nothing to lose. He was going to escape, no matter what. When he came up here, he told people he was going to escape, no matter what. He would go to any extent not to go back to North Carolina, and oddly enough, to the extent of attempting to kill himself at the very end. I think you can plug that in to how badly he didn't want to go back to North Carolina. He had absolutely nothing to lose. He came up here with the motive to escape.

* * * *

[545] Did he have motive, bias? I'll tell you he had all the motive and bias; he's facing the death penalty. He [546] told people he killed people and was facing life imprisonment in North Carolina. I think, as reasonable people, we would expect him to do nothing else because here again, like his escape, he has certainly nothing to lose by telling you anything that comes to his mind that will even remotely fit into the fact pattern as we know it.

* * * *

DISTRICT NO. 36

PRE-SENTENCE REPORT

Prepared By: Ms. Linda V. Jacobson, Chief
Mr. Frederick M. Rockwell Date Typed: 5-12-81
Probation and Parole Officers

CIRCUIT COURT OF ALEXANDRIA

Name: Wilbert Lee Evans
TN: Wilton Leon Evans

Place of Birth:
Raleigh, North Carolina

AKA:
Leon Evans, Charles Smith, "Big Lee" and "Smitty"

Sex: Male

Present Address:
Powhatan County Jail
Powhatan, Virginia

Race: Black

Marital Status:
Married-Separated

Permanent Address:
3905 13th Street, N.W.
Washington, D.C.

Dependents: Two

Age: 35 DOB: 1-20-46

Social Security No.:
Unknown

Judge: Honorable Wiley R. Wright, Jr.

Commonwealth Attorney: Mr. John Kloch

Defense Attorney: Mr. Stefan C. Long (Court Appointed)
Mr. E. Blair Brown (Court Appointed)

Tried By: Jury Trial Date: 4-17-81 Date of Disposition: 5-21-81

Offense(s): Murder
Firearm Violation

Indictment No.(c): F-5105

Plea(s): Pled Not Guilty to Murder
Pled Not Guilty to Firearm Violation

Verdict(s): Found Guilty of Murder: Jury recommended the death penalty.
Found Guilty of Firearm Violation: Jury recommended one (1) year.

Custody Status: In custody since 1-28-81 at the Powhatan County Jail.

Jail Adjustment: Powhatan facility records reflect no adverse reports.

Codefendant(s): None Disposition of Codefendant(s): N/A

* * * *

NAME: Wilbert Lee Evans

TN: Wilton Leon Evans

AKA: Leon Evans, Charles Smith, Wilbert Lee Evans, Wilbur Lee Evans, Wilbert Leon Evans, "Big Lee", "Smitty"

SEX: Male

RACE: Black

DOB: 1-20-46

SSN: Unknown

PRIOR RECORD:

FBI:	#215967 E	CCRE: #990020	
2-27-62	Ident. Raleigh, N.C.	Disch. Firearms in City	30 days SS for 1 yr.
6-24-62	" "	AWDW	6 mos. SS, 2 yrs pro
7-16-63	Rec. Sec. Raleigh, N.C.	Engaging in An Affray	1 month
2-24-64	Rec. Sec. Raleigh, N.C.	BE & L AWDW	6 mos. 6 mos. conc.
10-5-64	Rec. Sec. Raleigh, N.C.	Assault on Officer Affray with a Deadly Weapon	Nolle 4 mos.
6-3-65	Rec. Sec. Raleigh, N.C.	Assault and Battery Disorderly Conduct Resisting Arrest Breaking Arrest	6 mos.
10-6-66	Rec. Sec. Raleigh,	B & E Coin Machine	4 mos.
3-2-67	Rec. Sec. Raleigh, N.C.	Assault and Battery Disorderly Conduct	30 days 30 days exp.
12-6-67	PD Washington, D.C.	Disorderly Conduct	Unknown
2-23-68	D.C. Jail, Washington, D.C.	Petit Larceny Assault	360 days 360 day cons.
12-17-70	Dept. Corr. Raleigh, N.C.	Larceny A & B AISD	18 mos. 60 day Conc.

6-23-72	D.C. Jail Wash. D.C.	Fugitive from Justice	
7-12-72	Dept. of Corr. Raleigh, N.C.	Escape	3 mos. Exps of 1
9-27-72	Dept. of Corr. Raleigh, N.C.	Assault With A Deadly Weapon Inflicting serious Injury	4-5-years on 1 & 3 conc.
2-7-78	U.S. Attorney Washington, D.C.	Assault With a Deadly Weapon (2 cts)	Dismissed
11-8-80	PD Alexandria, VA	Fugitive From Justice	
11-11-80	B of 1 Raleigh, N.C.	Murder Armed Robbery	Pending
1-27-81	PD Alexandria, VA	Murder Firearm Violation	Instant Offense

DISTRICT OF COLUMBIA POLICE RECORDS:

6-22-72	Dis. Crops	Dispo Unknown

RALEIGH, NORTH CAROLINA POLICE RECORDS:

8-17-63	Affray	Judgment Absolute
2-20-66	Damage of Property	Dispo. Unknown
3-14-66	Capias	Dispo. Unknown
3-14-66	Damage to Property	25 days Susp. Costs Pd.
9-11-66	Assault and Battery	Dispo. Unknown
10-1-66	Breaking and Entering	Dispo. Unknown
1-6-67	Gambling	Dispo. Unknown
1-21-67	Disorderly Conduct	Dispo. Unknown
	Assault	Dispo. Unknown
2-27-67	Fail to Comply	Dispo. Unknown
2-27-67	Capias	Dispo. Unknown
12-9-70	Carrying a Concealed Weapon	Dispo. Unknown
7-31-74	Civil	Dispo. Unknown

NOTE: According to family members and the subject, *Wilton Leon Evans* is the defendant's legal, Christian name as recorded in church and birth records. For some inexplicable reason, the subject was incorrectly called *Wilbert Lee* and most of his legal and school records would so reflect. Further complicating the records was the birth of a younger brother legally named *Wilbert Lee.*

The defendant indicates that there has been no confusion within the legal system, reference the similar names and, after studying the FBI record sheet, Mr. Evans confirmed responsibility for all charges listed on FBI 215 967 E.

/s/ Linda V. Jacobson,
LINDA V. JACOBSON, Chief
Probation and Parole Officer
District #36

/s/ Frederick M. Rockwell
FREDERICK M. ROCKWELL
Probation and Parole Officer
District #36

FMR/dbv

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA

vs.

WILBERT LEE EVANS,
Defendant.

Alexandria, Virginia
Monday, June 1, 1981

The proceedings commenced at 9:30 o'clock a.m.

BEFORE:

THE HONORABLE WILEY R. WRIGHT, JR.

APPEARANCES:

JOHN E. KLOCH, ESQ., Commonwealth Attorney.

STEFAN C. LONG, Esq., and E. BLAIR BROWN, Esq., Moncure, Long & Brown, 121 South Royal Street, Alexandria, Virginia 22314, counsel for the defendant.

[3] PROCEEDINGS

Whereupon, the court reporter was sworn in.

THE CLERK: F-5105. The Commonwealth of Virginia versus Wilbert Lee Evans. John Kloch for the Commonwealth, Stefan Long and Blair Brown for the defendant.

MR. LONG: Ready for the defendant, Your Honor.

MR. KLOCH: Ready for the Commonwealth, Your Honor.

THE COURT: Have you gentlemen received the report made pursuant to the provisions of Code Section 192-264.5?

MR. LONG: Yes, we have received a copy that was forwarded by the Probation Department. I think Mr. Evans, he has received it and he has been given at least two opportunities to make supplements thereto. I have a supplement as Your Honor is aware and we have discussed it this morning with him, not in great detail, but we would ask for additions or deletions of statement concerning the contents thereof.

THE COURT: Do you need any additional time to review it with the defendant?

MR. LONG: No, Your Honor. I would indicate to the Court that we have had sufficient time to review it with him. We are prepared to go forward with him at this time.

* * * *

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA,

vs.

WILBERT LEE EVANS,
Defendant.

Alexandria, Virginia

Wednesday, September 21, 1983

The proceedings commenced at 10:30 o'clock a.m.

BEFORE:

THE HONORABLE WILEY R. WRIGHT, JR.

APPEARANCES:

JOHN E. KLOCH, Esq., Commonwealth Attorney; and RICHARD S. MENDELSON, Esq., Assistant Commonwealth Attorney; and RANDOLPH SENGEL, Esq., Assistant Commonwealth Attorney;

JONATHAN SHAPIRO, Esq., 1019 King Street, Alexandria, Virginia 22314; and KENNETH E. LABOWITZ, Esq., 118 North Alfred Street, Alexandria, Virginia 22314, counsel for the defendant.

• • • •

[22] THE COURT: Call your first witness.

MR. SHAPIRO: We call John Kloch and ask for leave to cross-examine.

THE COURT: You may do so.

Whereupon,

JOHN E. KLOCH,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q You're John Kloch?

[23] A Yes.

Q And you title?

A Commonwealth Attorney for the City of Alexandria.

Q You were Commonwealth Attorney at the time Mr. Evans was tried; in fact, prosecuted him, is that correct?

A Along with Randy Sengel, yes, sir.

Q You had been Commonwealth Attorney for some time prior to that?

A Yes, sir.

Q Had you ever handled a death case before?

A No, sir.

Q All right.

And it's true, is it not, that you paid particular attention to this case in light of its seriousness?

A I'd say yes, to all cases.

Q All right.

It's true, is it not, Mr. Kloch, that sometime prior to the trial you asked or directed Mr. Sengel to go to North Carolina, in the company of a police officer, to investigate Mr. Evans' police record?

A That among a lot of things. That was included in what he was there for.

Q And he, in fact, prepared a written report for you, [24] typewritten, concerning Evans' prior conduct; is that correct?

A Yes, he did.

Q All right.

And that report is, in fact, the same one that I attached to my memorandum, is that correct?

A Yes, sir.

Q A five-page typewritten report?

A I don't recall how many pages, but approximately, yes.

Q All right.

And it's your position now that concerning the report that Mr. Sengel was able to obtain that some of them were really judgments of conviction which had been appealed; is that correct?

A You say that's my position now? Maybe I don't understand the question.

Q You understood that in February didn't you?

A In February of when?

Q Yet me approach it another way.

A I don't know what you're getting at.

Q You're familiar with Commonwealth's Exhibit 21 as you had it at Mr. Evans' trial?

[25] A Yes, sir. If you're saying that I knew that there were two convictions and they were appealed resulting in one conviction, yes, sir.

Q All right.

Would you review Commonwealth's Exhibit 21, please.

(Exhibit handed to the witness.)

A All right.

Q Mr. Kloch, I'd like you to compare the various documents contained in Exhibit 21 with this chart I have prepared just to make certain that we're dealing with copies of Exhibit 21, aside from the first two pages which are the certification of the clerk in North Carolina.

A On page D there's a part cut off from the original.

Q At the very bottom?

A Yes. It says that notice of appeal bond and dollar —I can't read it, but that appears to be cut off of your exhibit, which is D, engage in an affray with a dangerous weapon, which is one of the ones you're talking about. They appear to be the same pages. Other than they're obviously separated in your case and do not have the certification on that, they appear to be the same pages.

Q And in the same order?

A Yes, sir.

[26] Q All right.

You will notice I have labelled them in the order you reviewed them, A, B, C, D, E, F, and G.

A Yes.

I would say that the exhibit you showed me, which was Commonwealth's Exhibit 21, has been taken apart. I'm assuming that it is in the same order that it was at trial.

Q All right.

Now, just so we're clear, when you received Mr. Sengel's report, you knew that conviction order C, which is for assault on an officer with a deadly weapon, had been appealled and nol-prossed; is that correct?

A Yes, sir.

Q And you knew that conviction order D which is an affray with a deadly weapon, had been appealed to a higher court?

A Were those convictions that occurred on the same date?

Q That's correct.

A I knew both offenses occurred on the same date and both convictions occurred on the same date, yes, sir.

Q Were you aware what I have labelled E, which is a commitment for engaging in an affray, was actually the [27] result of an appeal from conviction D, engaging in an affray?

A Yes, sir.

Q All right.

So, what appears to be three convictions were, in fact, but one?

A Yes, sir.

Q All right.

THE COURT: What was E, again?

MR. SHAPIRO: E, Your Honor?

THE COURT: Yes.

MR. SHAPIRO: E is a commitment to a state prison for engaging in an affray.

BY MR. SHAPIRO:

Q Did you personally tell Steve Long or Blair Brown of what you knew about these records? And I'm not speaking of what you made available to them in the way of documents. Did you ever tell them, from your mouth, what you knew?

A Yes, sir.

Q Prior to trial?

A I don't think I told them anything about any of the records prior to trial. I mean, we did it through a discovery process.

Q And, in fact, the first time you told them, by your [28] own mouth, was after Mr. Evans had been convicted; is that correct?

A Yes, sir.

Q And that came after a bench conference concerning the admissibility of these documents; is that correct?

A Yes, sir.

Q You remember that bench conference?

A I have a fairly good recollection.

Q And you recall then that Mr. Long made objections to, if not all, as many of these records as he could probably object to and he didn't want them to go to the jury; is that correct?

A I think he only made an objection to pages 2 and 3 of this exhibit.

Q All right.

Do you recall 2 and 3—

A (Interposing) Which is your A and B, I guess.

Q All right.

So, it was your understanding that Mr. Long was complaining about—

THE COURT: (Interposing) Let's get the transcript if need be.

MR. SHAPIRO: The transcript, I intend to produce [29] and examine from it.

BY MR. SHAPIRO:

Q Your understanding was Mr. Long was objecting to A and B, A being an indictment or corresponding document for breaking and entering and larceny, and B being the conviction for a single crime of breaking and entering and larceny; is that correct?

A My recollection was the objection, we couldn't prove that they—because there was no number on B, that it was the conviction for the indictment on A.

Q All right.

You recall that at that bench conference Judge Wright dealt with each of these documents in turn, asking for comments on each?

A He asked—My recollection is he asked the defense whether they had any objection.

Q All right.

Now, this was prior to you telling Mr. Long the problems you first discovered?

A Prior to my telling him from my mouth, that's correct.

Q And you recall Judge Wright going through what I've labelled A, B, C, asking if there were any objections, D, [30] was there any objection, E, any objection. Did you tell Judge Wright about the problems you discovered?

A No. It was not really a problem that I discovered.

Q There's no question pending.

A Okay.

* * * *

BY MR. SHAPIRO:

[43] Q Two more questions, and they're disjointed ones. One, concerning your conversation with Mr. Long back at the sentencing phase of the trial in which you testified you pointed out to him the problems here, what did he tell you?

A Verbatim?

Q As best you can recall.

A The best I can recall is "leave them in there; we'll argue them to the jury or we'll argue that to the jury or we'll cover it with the jury."

Q And the other question, Mr. Kloch, again concerning your bench conference with Mr. Long, Mr. Brown and Judge Wright, concerning the admissibility of these documents, I ask you, as Judge Wright went through the documents, if you [44] indicated whether there was any problem with them? Did you ever tell the judge what you knew about these three pieces of paper, C, D, and E?

A No, sir.

MR. SHAPIRO: No further questions.

* * * *

[52] BY MR. MENDELSON:

Q Now, at that point Commonwealth's Exhibit 21 was not even entered into evidence in the proceeding at that point?

A At that point, that's correct, because we were arguing over those particular pages, 3 and 4, which were A and B.

Q After resolution of pages A and B of Commonwealth's Exhibit 21, didn't Investigator Lewis Pugh testify?

A That's correct.

Q After he testified, there were several jury instructions that the Court then conferred with counsel and then, before the jury was charged, you and Mr. Sengel spoke to Mr. Long and Mr. Brown; is that correct?

A That's correct.

Q What was the purpose of that conversation?

A As an abundance of caution for lack of a better [53] word. I think, really, Mr. Sengel may have started up the conversation, but I quickly joined in. An abundance of caution to be sure everyone knew what we were dealing with.

Q That's before you introduced Commonwealth's Exhibit 21 into evidence?

A I really can't answer that. I'd have to let the record do that.

Q Let's take a look at the transcript to see when it was that you moved Commonwealth's Exhibit 21 into evidence.

MR. SHAPIRO: Your Honor, we'll stipulate that the documentary evidence was given to the jury at the close of all the evidence on the sentencing phase; in other words, after the conclusion of the Commonwealth's witness.

THE COURT: All right.

BY MR. MENDELSON:

Q Now, in your conversation with Mr. Long and Mr. Brown, when you pointed out the assault on the police officer was nol-prossed and the defendant convicted on the affray with a deadly weapon, what was the reaction of Mr. Brown and Mr. Long?

A Verbally, his reaction was, as you indicated before, that he would argue that to the jury, which I expected. And other than that, there was basically no [54] reaction. They just took it as a matter of course and I took it that that's what they expected to do, and I didn't pursue it any further. There was no surprise or shock or anything of that nature.

Q Now, that conversation you had with counsel, that was not all on the record, was it?

A It was not. It was while the Court was in recess. It was after the jury returned their verdict in regard to the sentencing phase.

Q What notation did you make, if any, of what transpired during the trial, especially with reference to things you said to counsel that were not on the record?

A I made two notations: One about this; and one other matter that was not on the record to the effect that Mr. Sengel and I had revealed this information to defense counsel and I put down, to the best of my recollection, what Mr. Long's response was.

Q I'll show you what is to be marked Commonwealth's Exhibit 1 for purposes of this hearing, which is a copy, and ask you, first, can you identify what it is?

(Document handed to the witness.)

A I guess it would be called the prosecution sheet. It's a sheet that goes on the inside, the front sheet of a [55] felony case. It sets forth what the charge is, who counsel is, and any Court action notes.

Q All right.

Mr. Shapiro has indicated to me that he wishes to see the original of that. Do you have that?

A Yes, I have it in my file.

May I, Your Honor?

THE COURT: Sure.

Do you know where it is, Mr. Mendelson?

THE WITNESS: I can find it quicker, Your Honor. It's quite an extensive file.

(Whereupon, the witness temporarily left the witness stand to retrieve the file and, thereafter, resumed the witness stand.)

BY MR. MENDELSON:

Q Using the original of Commonwealth's Exhibit 1, can you tell the Court what your notations read? For the record, what does the notation say?

A "Recess before argument on"—do you want that, or the entire one? There are two notes I wrote.

Q The note that pertains to the issue in question here today.

A At recess before argument on the sentencing part of [56] the trial, I and Randy Sengel pointed out to Steve Long that one of the North Carolina orders of conviction was merely an appeal, two others were assault and battery. Steve said, "Just leave them in there and we'll tell the jury about it," and I put my initial after it.

Q Now, when did you make the notation on your case file?

A I would say sometime very shortly after the conclusion of the jury trial. I don't know whether it was the same day, the day after. I would suggest probably the day after. It was a very exhausting trial and I probably waited until the next day, whenever I got back.

Q Is it not true the jury came back with the sentence and verdict late at night, nine o'clock or something like that?

A It was late in the afternoon.

* * * *

[67] STEFAN C. LONG,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Mr. Long, would you state your name for the record, please?

A Stefan C. Long.

Q And your occupation?

A Attorney-at-law.

[68] Q How long have you been attorney?

A Twenty years August 13th of this year.

Q Prior to going into private practice, what did you do?

A Went to college and law school, and worked for a law firm for seven years.

Q You were an Assistant United States Attorney, were you not?

A After I got through law school, I became an Assistant United States Attorney.

Q And you were an Assistant Commonwealth Attorney?

A An Assistant Commonwealth Attorney.

Q You represented Wilbert Evans at his capital murder trial?

A Yes, I did.

Q Along with Blair Brown?

A Right.

Q To the best of your recollection, Mr. Long, when did you first see the Commonwealth's sentencing exhibits?

A 19, 20 and 21?

Q Yes, sir.

A Right before the luncheon break.

Q On the last day of trial?

[69] A On the last day when we got into the aspect of the penalty.

Q And Exhibits 19, 20, and 21 consisted of various records of conviction or what purported to be records of conviction?

A Commitments, indictments, convictions and the like from North Carolina.

Q Did you have any strategy concerning those records? What did you want to do with them?

A Tried to keep them out, because, quite frankly, the way they were packaged they were confusing, at best. But, in addition to that, there were a large number of things, so we tried to keep them out. And failing that, we tried to minimize the effect they had by indicating they were mostly misdemeanors.

Q If you had an opening to keep out any one of those pages in 19, 20, and 21, would you have taken it?

A Oh, there's no question about that. If I could have kept out the convictions, I would have tried to keep them out.

Q During the sentencing phase or prior to the sentencing phase, did you have any knowledge that the purported conviction for assaulting a police officer with a [70] deadly weapon, which I've labelled C on this chart, and the one next to it, D, which is a purported conviction for an affray with a deadly weapon, were, in fact, not convictions at all?

A No, I didn't.

Q If you had known that, what would you have done?

A We would have objected to them going in, particularly the assault on an officer.

Q And why was that?

A Well, because the whole aspect of the trial was the commission of a killing on a police officer, an officer involved with the law. And, certainly, that, in addition to showing a propensity for violence, also shows a propensity for violence towards a police officer or an officer who is involved with the law.

Q Did anyone ever say to you, Mr. Long, these purported convictions, C and D, really had been appealed and are represented in E?

A Yes, as a matter of fact, they did. I don't remember whom it was, but it was certainly a considerable period of time after the trial, after the appeal to the Virginia Supreme Court, and after the petition for writ of certiorari to the Supreme Court had been denied.

[71] Q That's the first time you learned of it?

A The first time I learned of it was on the writ of *habeas corpus* in this case. It was either you or Mr. Slonaker, with the Attorney General's Office, who told me about it.

Q I'd like to direct your attention to your closing argument in the sentencing phase of the trial. On page 601 of the transcript of April 17, would you take a look at the first paragraph of your closing argument?

(Transcript handed to the witness.)

A I've read that before today and again today.

Q Do you recall what it was you were talking about when you said, "What looks like three convictions, there's only one"?

A I certainly do.

Q What was that?

A Before the arguments were made, Mr. Kloch said to me there is, in effect, one conviction for 21 instead of three, or what appears to be three, and that has to do with breaking and entering and larceny and something of that nature. When he indicated that to me, he indicated he would clear it up with the jury. And I looked again at the transcript and nothing is mentioned in there. When I got up, [72] the first thing I did was mention the fact that he had neglected to clear that up with them.

Q All right.

I want you to look at these records of conviction again that come from Exhibit 21. The first two, A and B, being the breaking and entering and larceny. Are those what you're referring to in that first paragraph?

A That's exactly right.

Q On document A, there appears to be two charges, and document B there is one, and you didn't want the jury to know there were three?

A There was no question that if he had not said anything to me I would not have known anything differently other than the two, what appears to be the two different charges. That's what was talked about.

Q Let me direct your attention to the next page of the transcript, 602.

A I've looked at that before today and today again myself.

Q And when you told the jury, and I'm quoting, "from '63 or '64 there were a number of misdemeanors," were you including the affray with a deadly weapon, the assault on the police officer, and the other affray, with a deadly [73] weapon?

A What I was talking about, Mr. Shapiro, was whatever was left from 19, 20, and 21. There was no specific reference to either 19 or 20, or what was left in 21; it was just whatever was left.

MR. SHAPIRO: Court's indulgence for a moment.

BY MR. SHAPIRO:

Q You represented Mr. Evans, did you not, in his appeal to the Supreme Court of Virginia, his petition for writ of certiorari to the United States Supreme Court?

A That's correct.

Q I know you're familiar with those documents (indicating).

A I read them again this morning.

Q And in there, the Commonwealth listed, did it not, what turned out to be these invalid convictions?

A It listed not only in the petition for—Well, not petition, but their brief in the Virginia Supreme Court, but in their opposition to our petition for a writ of certiorari or petition for certiorari from the Supreme Court of the United States. And in the same print, the same chronological information was used in the opinion of the Supreme Court of Virginia.

[74] Q If you had known that there was any problem with that recitation of prior convictions, would you have taken any action?

A Well, if I had known that—and I'm assuming what you're referring to is the fact that the assault or the affray with the police officer and the other assault were merged into one on appeal, which indicated a four-month jail sentence. First of all, I don't think I would have, number one, let it go by on the appeal in my brief. Secondly, when I received the brief from the Attorney General's Office, I don't believe I would have not made some comment to it. And, thirdly, if I had known about it before, I don't think I would not have made any comment when I got the opposition to my petition for writ of certiorari.

Q One more question just to be clear. Did Mr. Kloch or Mr. Sengel say to you at trial, or during the sentencing phase, in fact, the assault on a police officer and the affray were really appealed and embodied in this document?

A Mr. Shapiro, I have searched that in my mind and tried to determine, from my own independent recollection, what Mr. Kloch stated to me. And what Mr. Kloch stated to me had reference to the larceny charges. If he had said to me that those assaults, particularly the one on a police [75] officer, were, in effect, only one charge, there is one place we would have gone and that is we would have gone very quickly and cleared it up at the bench. That was never said.

In addition to that, if that was embodied in what he told me, then he either would have said something to the jury and I can assure you if he didn't I would have said something to the jury. And I certainly wouldn't have referred to something as just two items being one.

MR. SHAPIRO: No further questions, Your Honor.

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[83] BLAIR BROWN

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Good morning, Mr. Brown. Would you state your name for the record, please?

A Blair Brown.

Q How are you employed?

A Self-employed attorney.

Q For how long have you been practicing law?

A Little over six years.

Q And prior to that?

A I was a Deputy Clerk in the Circuit Court in Alexandria.

Q You defended Mr. Evans along with Stefan Long?

A Yes, sir.

Q And were you present throughout the entire trial, including the sentencing phase?

A Yes. There may have been times when I was in the hall doing one thing or another, but it all—the stages [84] when there was anything going on, yes, I was here.

Q All right.

I want to direct your attention to the records of conviction which were contained in Commonwealth's Exhibit 21 of that trial. You're familiar with these, are you not?

(Documents handed to the witness.)

A Yes.

Q Did anyone ever tell you, during the course of these proceedings, that this purported conviction for assaulting a police officer had been nol-prossed on appeal?

A No.

Q Or that this purported conviction for an affray with a deadly weapon was, in fact, the same as this additional conviction for assault or an affray with a deadly weapon on appeal?

A No.

Q Had you known that, would you have taken any action?

A I would have vigorously objected to the admissibility of all but those which were, in fact, convictions, that last one.

Q Why was that?

A Because the statute under the sentencing phase clearly says you're only entitled to records of conviction to [85] be entered on the basis on which the Commonwealth is proceeding in the case.

Q Even if the statute allowed things other than convictions, if you knew that those were not, in fact, convictions, would you, in fact, have taken any action?

A That's sort of a non sequitur. It does, so I don't know if I would. I would have objected strenuously under any circumstances I could think of.

Q When did you first find out there was the problem that I described to you with these records of conviction we have been discussing?

A When you told me significantly after the trial.

MR. SHAPIRO: No further questions.

* * * *

IN THE
SUPREME COURT OF VIRGINIA

Record No. 840474

WILBERT LEE EVANS,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF ON BEHALF OF THE COMMONWEALTH

GERALD L. BALILES
Attorney General of Virginia

DONALD R. CURRY
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

* * * *

At the outset of the penalty stage of the defendant's first trial, defense counsel requested a bench conference at which they voiced their objections to Exhibit 21. (App. 123). The trial court went through Exhibit 21 page by page, but counsel voiced no objection concerning the assault "convictions" at issue here. (App. 103-04, 125). Kloch knew that defense counsel had gone to North Carolina to investigate the defendant's criminal record, and believed that counsel were as familiar, or more familiar with the defendant's record than he was. (App. 112). When counsel voiced no objection to the trial court concerning the duplicative assault "convictions," Kloch concluded that counsel had made a strategic decision not to make such an objection. (App. 125).

Exhibit 21 was introduced at the conclusion of the Commonwealth's case at the penalty stage of the defendant's first trial. During a recess at that proceeding, just prior to the instructions to the jury, Kloch and one of his assistants informed defense counsel about the duplicative nature of the assault "convictions" set forth in Exhibit 21. (App. 128). Defense counsel received this information "as a matter of course" and with "no surprise or shock." (App. 128-29). In response, defense counsel, Stefan Long, stated that the matter "could simply be explained to the jury during closing argument rather than tampering with the exhibit as it had been presented to the Court." (App. 166). Within approximately a day after the conclusion of the defendant's first trial, Kloch recorded the substance of this conversation with defense counsel in a file note. (App. 130-31, 238).

During his closing argument to the jury, when reviewing the defendant's criminal record, Kloch only cited the offenses of which the defendant had actually been convicted. (App. 37-38, 132). Defense counsel, on the other hand, argued in reference to Exhibit 21 that ". . . in effect you're looking at three convictions and there's only one." (App. 40, 134).

Prior to final sentencing by the trial court, a presentence report was prepared. That report showed that one of the three assault "convictions" contained in Exhibit 21 had, in fact, been nolle prosequied. (App. 135, 154-55). Defense counsel voiced no objection at that time, and did not indicate that the presentence report had altered the understanding of Exhibit 21 which counsel had at the time of trial. (App. 136, 155-56).

* * * *

IV

THERE WAS NO PROSECUTORIAL MISCONDUCT, AND RESENTENCING THE DEFENDANT WAS NOT BARRED

* * * *

Prior to the defendant's first trial, John Kloch, the Commonwealth's Attorney, was aware that the three assault "convictions" contained in Commonwealth's Exhibit 21 represented, in fact, only one conviction. (App. 100-02). The evidence is clear, however, that Kloch communicated this information to defense counsel both before and during the defendant's first trial. Prior to trial, defense counsel had filed a motion for discovery, including a request for Evans' criminal record. (Record, file no. 1 at 8-9). In response, the Commonwealth not only provided the defense with a copy of Evans' "rap sheet," but also with a copy of the North Carolina "docket entries" listing Evans' convictions. (App. 119). These "docket entries" showed that the three assault "convictions" were, in fact, only one conviction.[10] Defense counsel admitted at the September 21st hearing that although he had received the discovery materials from the Commonwealth he had failed to "put two and two together."

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[10] The "docket entries," which were provided to the defense with the other discovery materials, are appended to this brief at Supp. App. 12. They appear in the record in file no. 1 at 60.

(App. 151). Additionally, at the time the Commonwealth filed its response to Evans' discovery motion, the Commonwealth informed defense counsel that they were free to inspect the records of Evans' convictions, including Exhibit 21, at their convenience. (App. 120; record, file no. 1 at 27).

At the outset of the defendant's first penalty trial, defense counsel voiced their objections to Exhibit 21. (App. 123). None of those objections, however, pertained to the duplicative assault "convictions" contained in that exhibit. (App. 103-04, 125). Not only did Kloch know that the defense had received the discovery materials which indicated the true status of the assault "convictions", he also knew that defense counsel had gone to North Carolina to investigate Evans' criminal record. Based upon this knowledge, Kloch concluded that defense counsel knew as much, and probably more, about Evans' record than he did. (App. 112). For that reason, Kloch felt no need at that point to inform defense counsel of something "they already knew." (App. 126).

Nevertheless, at the conclusion of the evidence at the penalty stage, but before Exhibit 21 was actually submitted to the jury, Kloch and one of his assistants made certain that defense counsel knew that the three assault "convictions" contained in Exhibit 21 were, in fact, only one conviction. (App. 128). Defense counsel were neither surprised nor shocked by this information, and one of them stated that the matter "could simply be explained to the jury during closing argument rather than tampering with the exhibit. . . ." (App. 128-29, 166). Kloch recorded the substance of this conversation in a file note. (App. 238). Although the testimony of defense counsel as to the substance of this conversation contradicted the Commonwealth's evidence, the trial court resolved this conflict in favor of the Commonwealth.

The closing arguments of counsel at the penalty stage demonstrate not only the Commonwealth's good faith concerning its representations to the jury about the defendant's criminal record, but also that defense counsel was aware of the true status of the defendant's criminal record. At the hearing on September 21st, the Commonwealth's Attorney testified that at no time did he intend or attempt to deceive the court, the jury, or defense counsel, about Evans' criminal record. (App. 135). That this is true is evidenced by the fact that during his argument to the jury concerning Evans' prior convictions, Kloch only referred to the one assault conviction in Exhibit 21 that was not duplicative. (App. 37-38, 132). Defense counsel's closing argument, on the other hand, corroborates Kloch's testimony that defense counsel were informed about the duplicative nature of the assault "convictions" and were content to merely explain the situation to the jury. When referring to Exhibit 21 during his argument, counsel explained to the jury that "in effect you're looking at three convictions and there's only one." [11] (App. 40).

Additionally, the circumstances surrounding the presentence report and the sentencing proceeding before the trial judge support a conclusion that defense counsel were aware of the true status of Evans' record at the time of the penalty proceeding before the jury. The pre-

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[11] Evans' reliance on the testimony of defense counsel that this argument did not refer to the assault convictions, but rather to the convictions for burglary and larceny, not only ignores the fact that the trial court resolved the conflicting inferences flowing from this argument in favor of the Commonwealth, it also misses the point. In assessing the claim of prosecutorial misconduct, it is the good faith of the Commonwealth which must be determined, not the subjective lack of knowledge on the part of defense counsel. It may well be that defense counsel misunderstood the information he received from the Commonwealth, but the fact that the Commonwealth made a reasonable effort to communicate the information to the defense demonstrates the Commonwealth's good faith.

sentence report showed that the conviction for assaulting a police officer had been nolle prosequied, yet defense counsel failed to indicate, in any way, that their understanding of the defendant's record was any different after they received the report that it was at the time of the penalty proceeding before the jury. (App. 64, 135-36, 154-56).

When all the evidence is viewed, as it must be, in the light most favorable to the Commonwealth and all issues of credibility are resolved, as they must be, in favor of the Commonwealth, it cannot be said that the trial court's finding of no prosecutorial misconduct was plainly wrong or without evidence to support it. Therefore, it should be affirmed by this Court.

* * * *

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 811056

WILBERT LEE EVANS,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF ON BEHALF OF THE COMMONWEALTH

J. MARSHALL COLEMAN
Attorney General of Virginia

JERRY P. SLONAKER
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

* * * *

III

THE VERDICT OF THE JURY ON SENTENCE WAS NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE AND OTHER ARBITRARY FACTORS, AND THE DEATH SENTENCE IN THE INSTANT CASE IS NOT DISPROPORTIONATE AND EXCESSIVE TO THE PENALTY IMPOSED IN SIMILAR CASES UNDER VIRGINIA LAW.

The jury found that after consideration of the defendant's prior record there existed a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. (App. 9). Accordingly, the jury set his punishment at death.

The defendant's previous criminal records submitted to the jury at the penalty phase were Commonwealth's Exhibits 19, 20 and 21. These records revealed the following past convictions and sentences:

Convictions	(Date & type of conviction)	Sentences
1. Feb. 21, 1964 (See Commonwealth's Exhibit 21; Supp. App. 5-6)	—"Breaking, Entering & Larceny"	"6 months"
2. July 26, 1964 (See Commonwealth's Exhibit 21; Supp. App. 7)	—Assault on a police officer with a deadly weapon while the officer was in the performance of his duties.	"6 months on road"
3. July 26, 1964 (See Commonwealth's Exhibit 21; Supp. App. 8)	—Engaging in an affray with a deadly weapon	"6 months on road" to run consecutively with other sentence of same date.

Convictions	(Date & type of conviction)	Sentences
4. September 30, 1964 (See Commonwealth's Exhibit 21; Supp. App. 9)	—Engaging in an affray with a deadly weapon	"4 months"
5. Dec. 15, 1970 (See Commonwealth's Exhibit 19; Supp. App. 10-11)	—"Assault & Battery & Assault Inflicting Serious Damage" (hitting victim in the face with his fist, breaking his nose and knocking one tooth out) (misdemeanor)	60 days
6. July 12, 1972 (See Commonwealth's Exhibit 20; Supp. 12-13)	—Escape from N.C. Penitentiary	3 months
7. Sept. 27, 1972 (See Commonwealth's Exhibit 21; Supp. App. 14)	—Assault with a deadly weapon inflicting serious injuries	Not less 4 years nor more than 5 years.

Most of the foregoing offenses—even though many were misdemeanors—involved serious violence to other human beings. Four offenses concerned use of a deadly weapon, and indeed one of those four convictions was for assault on a police officer with a deadly weapon while that officer was in the performance of his duties. One conviction was for escape from the North Carolina Penitentiary. (See Supp. App. 5-14).

Obviously the jury was not required to consider these prior convictions in a vacuum but rather in the light of the characteristics of the instant capital murder and the defendant's state of mind and attitude toward society and his fellow man as revealed by his own actions and statements.[7] In this light the defendant's criminal record

[7] Under the Virginia statute, § 19.2-264.2, prior criminal conduct is "the principal predicate for a prediction of further 'dangerousness.'" *Smith* v. *Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135

reveals that he has a deep-seated and callous disregard for human life and rules of society.

The evidence presented at trial shows that the defendant announced to his cellmates that he would escape by any means and kill without compunction, if necessary to accomplish that purpose. Then the next morning he proceeded to do just that. The defendant had calmly reflected at length on how he might escape and that he would kill anyone who stood in his way. He connived well in advance to agree to come to Alexandria from North Carolina for the ostensible purpose of testifying but with the real motive of escaping from custody—while fully realizing and accepting the prospect of killing someone in the process.

Even the murder of Deputy Truesdale did not temper the defendant's personal commitment to escaping and his willingness to kill to accomplish that goal. Subsequent to shooting Truesdale he told Officer Pough that he would attempt to escape again by any means possible and that it mattered not to him who was in his way. (App. 18). By the defendant's own admissions his state of mind and intent have not changed.

The record certainly sustains the jury's conclusion that there is a probability that the defendant would commit acts of violence that would constitute a continuing serious threat to society.

(1978), *cert. denied*, 441 U.S. 967 (1979). The jury, however, must consider all of the relevant evidence before determining whether the defendant has such a propensity to violence as to make him a menace to society. *Stamper* v. *Commonwealth*, 220 Va. 260, 275-277, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980).

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-6131

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Upon A Petition For Writ Of Certiorari To The
Supreme Court of Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Sixth Floor
Richmond, Virginia 23219

* * * *

The other evidence presented at this proceeding consisted of Commonwealth Exhibits 19, 20, and 21, showing several of Evans' convictions in North Carolina and the sentences imposed thereon as follows:

February 21, 1964	—Breaking, entering and larceny	—6 months
July 30, 1964	—Assaulting a police officer with a knife while the officer was in the performance of his duties	—6 months on road
July 30, 1964	—Engaging in an affray with a knife	—6 months on road to run consecutively with other sentence of same date
September 30, 1964	—Engaging in an affray with a deadly weapon	—4 months
December 15, 1970	—Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	—60 days
July 12, 1972	—Escape from North Carolina Prison System	—3 months
September 27, 1972	—Assault with a deadly weapon inflicting serious injuries	—not less than four years nor more than five years

Included in the jury instruction, all of which were unchallenged on appeal (See Appendix a at 9), was Instruction No. 14 stating in the alternative what the Commonwealth had to prove before the jury could fix Evans' punishment at death. After retiring to consider its verdict, the jury propounded two questions to the court; first, whether Evans' "past criminal record," to

which Instruction No. 14 referred, included all the evidence "offered before and after the verdict," and second, whether Officer Pough's testimony could be considered as part of Evans' record. The court answered both questions in the negative and further instructed the jury that the only evidence of Evans' past criminal record which it could consider was contained in Exhibits 19, 20, and 21. (April 17 tr. 610-611). Subsequently, the jury returned its verdict finding "after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society," and fixing Evans' punishment at death.

* * * *

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA,

—vs—

WILBERT LEE EVANS,
Defendant.

Alexandria, Virginia

Tuesday, January 31, 1984.

The trial commenced at 9:30 o'clock a.m.

BEFORE:

THE HONORABLE WILEY R. WRIGHT, JR., and a jury.

APPEARANCES:

JOHN E. KLOCH, Esq., Commonwealth Attorney.

RICHARD S. MENDELSON, Esq., Assistant Commonwealth's Attorney.

BLAIR D. HOWARD, Esq., 128 North Pitt Street, Alexandria, Virginia, counsel for the defendant.

GARY R. MYERS, Esq., 128 North Pitt Street, Alexandria, Virginia, co-counsel for the defendant.

PROCEEDINGS

[217] THE COURT: Commonwealth ready.

MR. KLOCH: Commonwealth ready.

THE COURT: Defense ready.

MR. HOWARD: I believe there are some preliminary matters that I would like to address. I have been over it with Mr. Koch all the places in the transcripts that he provided me with and I believe that's been ironed out. The only thing and I respectfully ask the Court to bear with me. I think this should apply to John or myself and inadvertently they get into some aspect of the demonstration. I would like the Court to know that I would interrupt.

THE COURT: That's understood.

MR. HOWARD: Your Honor, there are a number of things that came to my attention in reading this transcript that I believe are similar to the matter that we discussed yesterday about Boone's response to one of the questions. The first item that I brought to John's attention was on page 292 of Noel Butler's testimony.

THE COURT: I don't have that transcript before me.

MR. HOWARD: I don't believe so.

MR. KLOCH: I have an extra set broken down by witnesses.

[218] THE COURT: What line?

MR. HOWARD: I guess it would start with line 9, what occurred after that and her answer.

THE COURT: What is your objection?

MR. HOWARD: My objection is to the thumping that went on behind the door after he was apparently taken out of the courtroom and she says in her answer, I don't know what happened back there, all I heard in effect was a thumping. I don't think that sheds any light on the circumstances under which the shooting took place. Clearly only one can speculate as to what was going on behind the door and she clarifies it right in her answer that she doesn't know what was happening.

MR. KLOCH: Your Honor, I think it is corroborated by what little bit is left of Yvette Boone's testimony of what she told the Judge and what he went back there and did. She said he threw chairs. I think it shows certainly that it fits into his pattern of behavior. He didn't come up here to help the Commonwealth like he said he was going to do.

THE COURT: Mr. Howard, as I have indicated to you earlier, it's not my intention to go through this entire transcript and give you an opportunity to make an objection or objections that you think counsel should have made during [219] the course of the initial trial, and that's what you are seeking to do now. In addition to that, I agree with Mr. Kloch. When it's read in connection with the other evidence, it does have meaning. This objection will be overruled.

MR. HOWARD: The next objection would be in reference to two statements in the testimony of Ralph Washington. The first one on page 309. He gives a long answer beginning with line 13 and it's in reference to a conversation that he had with the defendant in the jail cell and it concludes down at line 20. The portion that I object to was his statement of an opinion of his, meaning Washington's.

He is not quoting anything that the defendant says and is not saying anything about the defendant. He gratuitously volunteers, man if this was the case, you had the right to kill people, do anything you wanted to them, the whole country would go crazy. This statement Washington attributes to himself and has nothing at all concerning my client's words or thoughts.

MR. KLOCH: Your Honor, I think it's admissible on two grounds. First of all, it's obviously an intricate part of that conversation. First of all, the first part of the conversation attributed to the defendant is that gives him a [220] reason why he is going to do what he is doing. This was merely a response to that statement and I think if the defendant told that after being with

Jasper—I am going to escape. You shouldn't do it and he doesn't. Nevertheless, I think it's relevant for that.

Secondly, I think it lends credibility to Ralph Washington himself. I know he is going to be attacked. He is a convicted felon, inconsistent statement. I think it goes to his credibility. I would ask that it not be stricken.

THE COURT: Objection overruled.

MR. HOWARD: Your Honor, the next item and for the life of me, I can't understand how this slipped by and I think we would be treading on error on the redirect and recross of Washington. Washington was asked if he did not make a statement to the investigator on page 326.

THE COURT: We are talking about page 326.

MR. HOWARD: The bottom of the page and the question is that I want you to start reading here with the word he and stop right here after the word people. He supposedly reads those words. From reading his testimony on cross examination, Mr. Long referred to a statement that he had made to the investigator which the Court admitted and was marked as Defendant's Exhibit A. You have to see that statement to follow it.

[221] MR. KLOCH: Your Honor, to short-circuit it, I would agree to strike all the further redirect examination. Whatever sense it would make, I think I would be further confusing the jury. It is kind of confusing. I don't see any need in arguing about it.

THE COURT: That's agreed that that will not be read into the record; that is, the further redirect examination that commences on page 326.

MR. HOWARD: The next would be and I think we agreed to Yvette Boone's testimony on 341 and 342 the portion of the statement with reference to the Judge, excuse me, 338 just the portion with reference to the Judge.

THE COURT: I think I resolved that doubt in your favor. I will adhere to that ruling.

MR. HOWARD: The next would be the witness Jasper's statement on page 362. Your Honor, Jasper said several times during his direct examination and made the comment that he said the following words let me go or I will kill your ass. He said that several times particularly in reference to page 362, and I am specifically concerned with lines 15, 16, and 17. Now, nowhere at any time when he made that statement, Jasper, does he identify who he is.

If you read 15, 16, and 17, then the gun went up in [222] the air like this and Truesdale put his hands on it like this, and then he said let go or I will kill your ass. He has never asked and never identifies in the record who he is.

THE COURT: Then you may argue it to the jury.

MR. HOWARD: Just for the record, that was never clarified in the record.

THE COURT: I think the jury is free to draw certain inferences when they consider it in its entirety. If you want to argue that the defendant didn't say it and Truesdale said it, you may do so.

MR. HOWARD: It is a very damaging statement and it was never clarified in the record. I don't think the jury should speculate unless it was incumbent upon the prosecution to clarify who said what and point out the defendant and so forth, that was just not done.

THE COURT: If you argue that Truesdale said that, you may do so. Any other preliminary matters?

* * * *

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF ALEXANDRIA

Law No. 7371-H.C.

WILBERT LEE EVANS,
Petitioner,

v.

TONI V. BAIR, SUPERINTENDENT,
Respondent.

ANSWER

Now comes the respondent, by counsel, and in answer to the third amended petition for a writ of habeas corpus, says as follows:

* * * *

19. As to claim VI, the record establishes that in the trial court the petitioner did not object to the use of the transcript *per se* on either due process or Sixth Amendment grounds. Petitioner wanted the transcript to be read by one individual (Tr. January 30, 1984 at 210-211) and he later objected to specific portions of the transcript being read to the jury (Tr. January 31, 1984 at 218-222). At no time in the trial court, however, did he contend, as he now does, that use of the transcript denied him due process and his right to confront adverse witnesses. The record also shows that petitioner did not raise such a claim on direct appeal. (See Exhibit I, excerpt from petitioner's appellate brief). A claim which could have been raised at trial and on appeal cannot be raised for the first time in a habeas corpus proceeding. *Slayton v. Parrigan.*

Furthermore, use of the transcript did not violate petitioner's constitutional rights. Petitioner had the op-

portunity to confront and cross-examine the witnesses in question at the time they originally testified. The Supreme Court of Virginia has approved such use of the transcript from the guilt stage of a trial when a defendant's death sentence is vacated and the case is remanded for a resentencing proceeding. *Fogg v. Commonwealth*, 215 Va. 164, 168, 207 S.E.2d 847, 850 (1974); *Huggins v. Commonwealth*, 213 Va. 327, 329, 191 S.E.2d 734, 736 (1972); *Snider v. Cox*, 212 Va. 13, 14, 181 S.E.2d 617, 618 (1971).

* * * *

IN THE SUPREME COURT OF VIRGINIA

Record No. 860831

WILBERT LEE EVANS,
Petitioner,

v.

TONI V. BAIR, SUPERINTENDENT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

MARY SUE TERRY
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DONALD R. CURRY
Assistant Attorney General

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Richmond, Virginia 23219
(804) 786-4624

* * * *

VI. THE COURT BELOW CORRECTLY RULED THAT EVANS' CONFRONTATION CLAIM CONCERNING USE OF A TRANSCRIPT AT HIS RESENTENCING PROCEEDING CANNOT BE LITIGATED ON HABEAS CORPUS.

Petitioner contends that use at his resentencing proceeding of a transcript from the guilt stage of his trial denied him his right, under the Sixth Amendment, to confront adverse witnesses. This is so, Evans alleges, because there was no showing that the witnesses from the guilt trial were unavailable to testify at the resentencing proceeding.

The record establishes, however, that in the trial court the petitioner did not object to the use of the transcript on Sixth Amendment grounds. While petitioner wanted the transcript to be read by one individual (Tr. January 30, 1984 at 210-211) and he later objected to specific portions of the transcript being read to the jury (Tr. January 31, 1984 at 218-222), at no time in the trial court did he contend, as he now does, that use of the transcript denied him his right to confront adverse witnesses.[6] Nor did Evans raise any claim with respect to whether the witnesses were "unavailable." To the contrary, the record clearly indicates that defense counsel and the prosecutor had agreed to use the transcript. (Tr. January 30, 1984 at 210-211).

Regardless of what occurred in the trial court, the record also shows that no claim regarding use of the transcript was raised on direct appeal. A claim which could have been raised at trial and on appeal cannot be raised in a habeas corpus proceeding. *Slayton v. Parri-*

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[6] This fact, by itself, is sufficient to distinguish Evans' case from *Tichnell v. State*, 427 A.2d 991 (Md. App. 1981). In *Tichnell*, the transcript was used over the defendant's "vociferous objection." 427 A.2d at 993.

gan, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975).

Furthermore, use of the transcript did not violate petitioner's constitutional rights. Petitioner had the opportunity to confront and cross-examine the witnesses in question at the time they originally testified. This Court has approved such use of the transcript from the guilt stage of a trial when a defendant's death sentence is vacated and the case is remanded for a resentencing proceeding. *Fogg v. Commonwealth*, 215 Va. 164, 168, 207 S.E.2d 847, 850 (1974); *Huggins v. Commonwealth*, 213 Va. 327, 329, 191 S.E.2d 734, 736 (1972); *Snider v. Cox*, 212 Va. 13, 14, 181 S.E.2d 617, 618 (1971).

• • • •

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

LAW-7371

COMMONWEALTH OF VIRGINIA,

—vs—

WILBUR LEE EVANS,
Defendant.

Alexandria, Virginia

Monday, December 16, 1985.

The trial commenced at 10:00 o'clock a.m.

BEFORE:

THE HONORABLE DONALD H. KENT.

APPEARANCES:

DONALD R. CURRY, Esq., Assistant Attorney General, 101 North 8th Street, Richmond, Virginia.

RICHARD F. GOODSTEIN, Esq., 1666 K Street, N.W., Washington, D.C., counsel for the defendant.

PROCEEDINGS

[3] MR. SHAPIRO: I would like to introduce Karen Shears to the Court. She is practicing under the rules concerning the third year of practice in Virginia. She has been admitted to practice under the Virginia Supreme Court and I would ask the Court to have her play some role in the hearing today. None of us anticipate this will go longer than a day. To accommodate some witnesses, some are on call.

MR. GOODSTEIN: I am Richard Goodstein on behalf of the petitioner, Mr. Evans, and this is Thomas Cannell who is a colleague of mines. Your Honor, before we call our first witness, I would just like to formally renew our Motion for Disqualification that was filed December 15th [5th]. After we filed that motion, I received a phone call from your Honor the next morning at which I was informed that I should notify the Assistant Commonwealth Attorney that the motion will be denied. We are renewing that motion at this time.

THE COURT: Do you want to make some proffer of fact for the record. The facts as you know them are not the facts as I know them.

MR. GOODSTEIN: If I may when Mr. Brown is on the witness stand, perhaps I would be able to elicit the facts there and if we may renew the motion thereafter, perhaps that [4] will be the way you would permit us to proceed.

THE COURT: That seems a little bit late. Mr. Brown was not my law clerk. He worked in the clerk's office which is a separate entity from this Court just as Mr. Seaman, and Mr. Bell was there last week. Mrs. Stewart the week before and a different person sits in that chair almost everyday.

MR. GOODSTEIN: It was my understanding with discussions from Mr. Brown he for the better part of the three years was the courtroom clerk.

THE COURT: Last year, ten years ago.

MR. GOODSTEIN: I believe ten years ago.

THE COURT: Yes, sir, he did clerk for me when I was in Court on occasions. I have no more or less of a relationship with Mr. Brown than I do with any other member of the bar that practices before this Court.

MR. GOODSTEIN: We made the points that we wanted to make in the written motion.

THE COURT: I think it is without any merit whatsoever. If there was any basis for me to refute myself, I would be the first one to do it. I do not see any basis whatsoever for doing it in this case.

MR. GOODSTEIN: I would request with respect to your request we make a proffer. This will be my first opportunity [5] to elicit on the record and under oath information from Mr. Brown. I don't expect it will take very long as we would with any witness in terms of bringing out this background. If I could ask him questions along this line, it would put this to rest once and for all.

* * * *

[143] BLAIR BROWN

was called as a witness by and on behalf of the Defendant, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOODSTEIN:

Q Give your name for the record?
A Blair Brown.
Q Where are you employed?
A Self-employed as an attorney.
Q Where are you employed?
A Alexandria.
Q Mr. Brown, when did you graduate from law school?
A I never seen the inside of the law school. I am a law reader.

Q Did you pass the bar examine?

A Yes.

Q When did you pass the bar?

A February of 77. I guess April of 77 when I found out.

Q When did you begin your studies to prepare for the bar examination?

[144] A 1974, 1973.

Q Would you trace your employment history starting with college and graduation?

A Graduated from college and went to work for the Maureen Lloyd Agency in Baltimore and left there after a year. Was a deputy clerk for the Circuit Court predecessor in Alexandria.

Q What year?

A In 1972. I worked there for five years until May of 77 and then I left there and as far as practicing law.

Q So you were studying or reading for the bar during the time you were what title?

A Deputy Clerk.

Q Your studying and deputy clerk overlapped?

A Yes.

Q Can you describe what your duties entailed as a deputy clerk from the time you began in 72 until you left in 77?

A Generally they were the same although the degree of responsibility changed somewhat. The clerk's office is the chief paper shuffler. You take in all the Court suits, issue writs and I would say a third of my time was spent sitting where Mr. Seaman is to the equivolent chair and in Court [145] probably two out of five days a week.

Q You were in Court two out of five days a week?

A On the average.

Q Would that have been true from 72 on or did that increase over time?

A I say for the first six months I didn't see the inside of a courtroom. After that, it was pretty much the same and may be on a different week than others and an average of no more than two or three days a week.

Q When you say your duties were handling paper shuffling, what basically is it that you do when you are not in the courtroom; what did you do?

A That's a better question. If a lawyer or any one else brings in a suit filed in the Circuit Court, they file it in the clerk's office. An individual clerk or deputy, generic term in suit, process the paper and issue the notice motion for judgment and issue a subpoena for whatever the writs might be. We attach an occasional garnishment and a whole lot of things. In addition to that when I was up in Court on a criminal day, Commonwealth Day which is held three days a month, at that point the clerk's office and the individual clerks had the responsibility for preparing all the orders for the Court to enter. I did that usually the day after I was in [146] Court. That lasted probably for three years or a little more during my term in the clerk's office. And after that, they hired somebody whose job it was to prepare the orders and everybody breathed a large sigh of relief.

Q Did you continue to spend more time in Court as the years went on from 72 to 77?

A I don't know if it was more. Seemed to be later once and a while when the jury was out you stayed. In terms of hours spend perhaps, but in terms of repetition going back to Court, I don't think so.

Q What is the assignment process in the clerk's office with respect to your sitting in the chambers or the courtroom of a particular judge?

A Happened by default. After a while, one clerk or one deputy would generally and this is not always the case and I don't mean to imply ended up with one judge mostly because they got use to each other. They got along well or by default you go with him and I say yes, sir and after a while, it came to be that. I don't know what the process was.

Q Who would be the person to say you go here and you go there?

A It is asking like which sergeant told you to jump. When I first started there, I guess Jack Sullivan was the one [147] who tole me and under what circumstances. Thereafter, it was just a matter of which judge I sat with when I went to court.

Q Do you know whether the particular judge had any input to the clerk's office, I prefer this one than that one?

A I doubt it because we ended up changing at the last minute fairly regularly. I don't mean to put words in the Court's mouth. I don't think they had any input.

Q So there came a time you were assigned to one particular judge?

A No. I was assigned to go to Court on a regular basis. It was sort of a tradition that I ended up one or more and then for a while with another judge.

Q Was it Judge Kent you tended more time with?

A Ultimately whenever he was on the bench. I was with Judge Giammitorio and Judge Kent's predecessor was on the bench six months or so. I was his clerk most of the time. Judge Kent came on and since I was the junior assistant, the flunky, I ended up with the most junior judge.

Q When was that?

A I would say sometime in 1974. Whenever he first went on the bench.

Q Would it have been from 74 through whenever you left the clerk's office staff that you were assigned to a Court [148] and matched up with Judge Kent?

A I say of the three judges, most of the time I spent with Judge Kent and the balance between the other two judges.

Q What are your in court responsibilities as a deputy clerk?

A Hardest part is staying awake. After that, swear the witnesses, mark the exhibits. If it is a jury trial, swear the jury, administer the voir dire, take the verdict. It is paper shuffling sometimes. It is real important and other times it is not.

Q As a deputy clerk, do you have occasion to speak with the judge in his courtroom ann outside of Court?

A Oh, sure.

Q Where?

A In the old courthouse, the judges chambers were not in back of the courtrooms. They were almost half a mile away. Several corridors away and had to go through the public corridors. If the jury was out, they would stay in chambers which is a room equivolent to the jury room. And the court reporter and the clerk comes in and swopped lie stories and sometimes for several hours on end. If there was something to do, nobody felt like doing it.

Q Non court business, the Redskins, what have you? [149] A Frequently.

Q Was the law clerk in there from time to time?

A Didn't have a law clerk then.

Q Was there anybody who was equivolent to the law clerk for the judge?

A Not really. There was no law clerk until Judge Backus retired. I don't know for whatever reason. Nobody who performed that function. They did all their own research and wrote all their own opinions and that's what a law clerk does. I don't say they do all the research and write opinions. There was no one then who performed that function.

Q Did you have occasion on behalf of any of the judges in whose courtroom you worked to pull a case, schedule an argument, those types of things?

A I can remember pulling a case occasionally for Judge Backus. In terms of scheduling an argument, the Court has been accessible. If you make a phone call, they are likely to call you back and schedule it at 9:00 in the next morning. I never scheduled anything for them. I don't think so.

Q Did you ever has occasion to discuss cases with Judge Kent?

A Specific cases being tried.

Q Either cases in your courtroom or just law as a [150] general matter.

A Cases going on ir the courtroom, sure. Not every time, but frequent.

Q Did he ever ask you your opinion with respect to disposition of a motion or whether you believe a certain witness that type of thing?

A Not that I remember. I can remember his telling me I am going to rule this way and tell me why. I would scratch my head and say okay. I got interested sort of after the fact. I knew what was going on and what was happening. I don't think he ever asked my opinion as to how something should be granted or not or whether I believed the witness or not. That was something he did all by himself.

Q Did you have occasion to encounter Judge Kent and others outside of the courtroom or chambers, have lunch or see them somewhere else?

A Oh, yes, occasionally.

Q With respect to Judge Kent, would that true sort of on the same percent, 50 percent?

A The number of times I saw Circuit Court judges, I can't say. I would see Judge Backus at the Hardware Store almost every Saturday for one reason or another. He was buying something and I was buying something. It was the time [151] of day to get started on something. I don't know if I saw Judge Wright and rarely we would go to the same place. Once and a while I saw Judge Kent.

Q Didn't see him at his house?

A Never been to his house, no.

Q Or he to yours?

A Actually, he did come to mines once for a Christmas party.

MR. CURRY: If this is an investigation trying to elicit something—

THE COURT: (Interposing) I love it. If this is my investigation, continue. I did go to his house for a Christmas party back in the early 80's along with others.

THE WITNESS: With 50 other folks.

THE COURT: Mr. Brown also sends me a Christmas card that I received a couple of weeks ago. If you want to count those, look on my secretary's desk.

BY MR. GOODSTEIN:

Q Have you ever discussed with Judge Kent after you left as a deputy clerk for private practice?

A Practice law, prosecutor, whatever.

Q May be join a partnership with other lawyers?

A I think in probably a broad general amount. He [152] practiced law. I took all the information I could get. We discussed it. I don't know of any specifics.

Q When you read for the bar, do you have to submit an application and a list of references?

A Yes.

Q Was Judge Kent one of them?

A No, I knew him as a lawyer and would see him once every six months on that basis then. I hardly knew the man.

Q When was your application submitted?

A In July or so in 1973.

Q Has there ever come a time you had to list Judge Kent for a reference for anything that you rember?

A Admission to practice before the U.S. District Court which is an application that Judge Bryant created. You must be recommended by a local judge.

* * * *

No. 86-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILBERT LEE EVANS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is petitioner's claim of ineffective assistance of counsel, on the direct appeal of his original death sentence, moot in view of the fact that his original death sentence has been vacated and he has been resentenced to death at a sentencing proceeding free from error?

II. Was petitioner denied the effective assistance of counsel at the guilt stage of his trial for capital murder when counsel chose not to object to the prosecutor's argument?

III. Was petitioner denied the right to confront and cross-examine adverse witnesses at his resentencing proceeding when, with the petitioner's approval, a transcript was used as a substitute for the testimony of certain witnesses?

IV. Does petitioner's claim concerning recusal of the state habeas judge raise a substantial federal question?

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257(3).[1]

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[1] Evans' petition is styled as a "PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ALEXANDRIA, VIRGINIA." (Ptn. 1). Likewise, in his prayer for relief, Evans requests a writ of certiorari "to review the order and opinion of the Circuit Court of Alexandria, Virginia." (Ptn. 30). This Court, however, has no jurisdiction, pursuant to 28 U.S.C. § 1257 or any other federal statute, to review the decision of a state trial court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at SA-1-2, and in the appendix to this brief in opposition at A. 1a.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated "(Ptn. ___)." References to the appendix of the Petition for Writ of Certiorari will be designated "(App. ___)." And references to the appendix to this brief in opposition will be designated "(A. ___)."

STATEMENT OF THE CASE

On April 17, 1981, a jury in the Circuit Court of the City of Alexandria convicted the petitioner, Wilbert Lee Evans, of capital murder. After a separate hearing on the issue of punishment, the same jury recommended the death penalty. On June 1, 1981, the Circuit Court imposed the death penalty in accordance with the jury verdict. The conviction and death sentence were affirmed by the Supreme Court of Virginia on December 4, 1981. *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981) (*Evans I*). (App. 17a-31a). This Court denied a petition for a writ of certiorari on March 22, 1982. 455 U.S. 1038 (1982).

Petitioner initiated state habeas corpus proceedings in April 1982. He amended his habeas petition on two occasions, the second in early January 1983. The Commonwealth confessed error in the petitioner's sentencing proceeding on April 12, 1983, and on May 2, 1983, the Circuit Court of the City of Alexandria entered an order setting aside Evans' death sentence. On September 21, 1983, the Circuit Court conducted an evidentiary hearing

to determine whether Evans should be resentenced or his sentence reduced to a life term. By an order dated October 12, 1983, the Circuit Court directed that Evans be resentenced.

On January 30, 1984, the Circuit Court impaneled a new jury for a resentencing hearing, and at the conclusion of that proceeding the jury recommended the death penalty. On March 7, 1984, the Circuit Court imposed the death penalty in accordance with the jury verdict. The Supreme Court of Virginia affirmed Evans' death sentence on November 30, 1984. *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984) (*Evans II*). (App. 32a-46a). This Court again denied certiorari. 105 S.Ct. 2037 (1985).

On May 14, 1985, Evans reinitiated state habeas corpus proceedings. The Circuit Court of the City of Alexandria dismissed most of E. ..is' claims without a hearing on September 18, 1985. (App. 1a-2a). An evidentiary hearing was conducted on the remainder of Evans' claims on December 16, 1985. Those claims were denied in the Circuit Court's letter opinion dated May 19, 1986 (App. 3a-13a), and Evans' habeas petition was dismissed in its entirety by an order dated June 3, 1986. (App. 14a-15a). Evans' petition for appeal to the Virginia Supreme Court was refused in an order dated February 26, 1987. (App. 16a).

STATEMENT OF FACTS

On January 27, 1981, the petitioner, a prisoner, fatally shot a deputy sheriff who was escorting him to jail in Alexandria. Evans had pretended to be a willing witness for the Commonwealth, but his sole purpose in cooperating with the authorities had been to engineer an escape after being brought to Virginia in custody from North Carolina. He planned to kill anyone who attempted to prevent his escape and he acted on this intent when he killed the victim. (App. 45a). The evidence at the resentencing hearing revealed that Evans had a significant prior history of

violent criminal conduct. (App. 45a). The jury's imposition of the death penalty was based upon a finding of the petitioner's "future dangerousness." *See* Va. Code § 19.2-264.2. (Ptn. SA-1).

REASONS FOR DENYING THE WRIT

I. Because Evans' Original Death Sentence Was Vacated And He Has Been Resentenced To Death, His Claim That He Was Denied The Effective Assistance Of Counsel On The Direct Appeal Of His Original Death Sentence Is Moot.

Evans contends that he was denied the effective assistance of counsel on the direct appeal of his original death sentence because appellate counsel failed to discover and bring to the attention of the Virginia Supreme Court or this Court the errors in the records of Evans' prior convictions upon which that death sentence, at least in part, was based.[2] (Ptn. 3, 18). Because, however, Evans' original death sentence has been vacated, and he has been resentenced to death at a proceeding free from error, his claim of ineffective assistance of counsel is moot. *See Hyman v. Aiken*, 777 F.2d 938, 941 (4th Cir. 1985) (vacating death sentence renders moot ineffective counsel claims pertaining solely to penalty stage), *vacated and remanded on*

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[2] Evans contends that this Court should grant the writ on this claim to instruct lower courts whether the effectiveness of counsel on appeal, guaranteed by *Evitts v. Lucey*, 469 U.S. 387, 389 (1985), is governed by the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). (Ptn. 3-4, 16, 17 n.17, 18). As this Court has already answered that question in *Smith v. Murray*, ___U.S. ___, 106 S.Ct. 2661 (1986), no such instruction is necessary. In *Smith*, this Court expressly applied the *Strickland* standard and found that the attorney's decision in that case "not to press [a] claim on appeal" did not constitute ineffective assistance of counsel. *Smith*, 106 S.Ct. at 2667. Indeed, in Evans' case, the Commonwealth conceded in the courts below that *Evitts* and *Strickland* governed this claim. Thus, Evans' primary reason why certiorari should be granted in this case is based upon a faulty premise.

other grounds, 106 S.Ct. 3327 (1986). *See also Poland v. Arizona*, ___U.S. ___, 106 S.Ct. 1749, 1753 (1986) (when death sentence vacated on appeal, "clean slate" rule applies unless basis of decision is insufficiency of evidence). The obvious reason why Evans' claim is moot is because, having obtained the invalidation of his original death sentence, he cannot demonstrate the actual prejudice required under *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Evans' sole assertion of prejudice is premised upon his claim that if his death sentence had been vacated during his original direct appeal, the Virginia Supreme Court would have been required, as a matter of state law under *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981), to commute his sentence to life imprisonment. (Ptn. 19-20). This issue of Virginia law, however, was decided adversely to Evans in his second direct appeal[3] (App. 35a-

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[3] In *Evans II*, Evans asserted, and the Supreme Court of Virginia rejected, the same underlying claim concerning the applicability of *Patterson* to his case which he has raised in the instant petition. The Virginia Supreme Court stated as follows in *Evans II*:

> Defendant *contends* that application of the revised sentencing law to him violates the prohibition against *ex post facto* laws....Evans says [that] under the law as it existed at the time he committed his offense, at the time he was tried, at the time his first conviction was affirmed, and at all times before approval of the emergency legislation, he was entitled to a sentence of life imprisonment upon the setting aside of his death sentence. He argues that as the result of *Patterson*: "Automatic commutation in such situations thus *became a part of Virginia's law* just as surely as if it had been drafted by the legislature."
>
> *Evans contends that had the errors which led to the Commonwealth's confession of error been brought to our attention at the time of his first appeal, we would have done in Evans what we had done...previously in Patterson, and Evans would have received a life sentence. He contends the considerations which led the Court to commute Patterson's sentence...applied with full force to Evans' case....We reject defendant's con-*

36a), and again during the state habeas corpus proceedings. Because the Virginia Supreme Court, as the final arbiter of Virginia law, has determined that *Patterson* would not have been applicable to his case if his original death sentence had been vacated on direct appeal, Evans' assertion of prejudice must fail. *See Brown v. Ohio*, 431 U.S. 161, 167 (1977) (state's highest court is the final authority regarding matters of state law).

Although a finding of no prejudice makes it unnecessary to examine counsel's performance, *Strickland*, 466 U.S. at 697, Evans has also failed to demonstrate that original appellate counsel's performance was objectively deficient. Prior to trial, counsel had traveled to North Carolina to investigate Evans' record of prior convictions. (App. 40a). Contrary to Evans' assertions (Ptn. 7, 8), counsel objected to some of the records when they were introduced at trial. (A. 6a-7a). After trial, counsel gleaned from the record Evans' most viable claims, including the claim involving the admission of evidence of other crimes, and raised them on appeal in the Virginia Supreme Court. (App. 17a-31a). Evans' contention that counsel had an additional duty to go beyond the trial record and to continue to investigate Evans' record of prior convictions is simply untenable.[4]

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tentions and conclude that there has been no *ex post facto* violation.

(App. 35a-36a, emphasis added).

[4] Evans' assertion that the Commonwealth has "long urged" that his original trial counsel were aware at the time of trial of the errors in the record of convictions (Ptn. 8 n.8, 17) ignores the fact that the cited portions of the Commonwealth's brief from *Evans II* pertained only to a claim of prosecutorial misconduct and how the prosecution's good faith related to that claim. In the same brief, the Commonwealth expressly stated: "It may well be that defense counsel misunderstood the information...received from the Commonwealth, but the fact that the Commonwealth made a reasonable effort to communicate the information to the defense demonstrates the Commonwealth's good faith." (App. 84a n.11).

First of all, it took Evans' habeas attorney approximately one year to investigate the matter of the erroneous conviction records and to obtain the affidavit from a North Carolina official which led to the Commonwealth's confession of error.[5] It is patently unreasonable to argue that appellate counsel could have discovered and demonstrated the errors in the conviction records during the considerably shorter time that the case was on direct appeal.

More importantly, appellate counsel had no duty to go outside the trial record because nothing beyond that record, even if it had been discovered, would have been cognizable on appeal. It is beyond question that the records which were introduced at trial could not have been demonstrated to be erroneous without proof of matters outside the trial record. Virginia law is clear, however, that an appeal can only be decided upon matters of record. "The Commonwealth and the defendant must stand or fall upon the case that was made in the lower court and reflected by the record under review. [The Virginia Supreme Court] is not a forum in which to make a new case." *Guthrie v. Commonwealth*, 212 Va. 602, 604, 186 S.E.2d 69, 70 (1972). *See also Bunch v. Commonwealth*, 225 Va. 423, 436, 304 S.E.2d 271, 278 (1983) (rule applied in capital case). This Court follows the same rule. *See New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970).

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[5] Evans' habeas petition was filed on April 9, 1982, and was amended by Evans as late as January 1983. Evans' habeas attorney did not secure the affidavit in question until March 22, 1983. The Commonwealth confessed error on April 12, 1983. Evans' assertion that the Commonwealth "confessed" that the erroneous evidence had been "knowingly" introduced (Ptn. 2) is rebutted by the record. The letter confessing error plainly states that the error had been "unbeknownst to the prosecution or defense counsel." (App. 48a). Likewise without foundation is Evans' suggestion that the Commonwealth deliberately delayed confessing error for tactical advantage. (Ptn. 10 n.10). In *Evans II*, the Virginia Supreme Court, as well as the state trial court, decided that factual claim adversely to Evans and found that the Commonwealth had acted in good faith. (App. 40a-41a).

Thus, Evans' contention that counsel had a duty to continue to investigate matters outside the record while the case was on appeal is antithetical to established principles of appellate practice. A failure to conduct such an investigation cannot be the basis for a finding of deficient performance under the first prong of the *Strickland* test.

II. Petitioner Was Not Denied The Effective Assistance Of Counsel At The Guilt Stage Of His Trial When His Attorneys Chose Not To Object To The Prosecutor's Argument.

Evans contends that his original trial attorneys were constitutionally ineffective because they failed to object to certain portions of the prosecutor's argument[6] at the guilt stage of Evans' trial. (Ptn. 21). This claim is entirely without merit.

The state habeas judge conducted an evidentiary hearing on this claim, and made an express finding of fact that Evans' trial attorneys chose not to object to the prosecutor's argument, or to request a limiting instruction, for tactical reasons. (App. 8a-9a, 12a-13a). Counsel made a deliberate determination "that an objection and instruction would do nothing more than highlight the [prosecutor's] argument for the jury." (App. 9a).

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[6] Evans completely mischaracterizes the prosecutor's argument. The prosecution did not argue as petitioner alleges (Ptn. 21) that Evans had, in fact, killed other people. To the contrary, both cited portions of the prosecutor's argument (App. 56a) are explicitly couched in terms of comments upon evidence of Evans' "motive." During the prosecution's case, the trial court admitted, over defense counsel's objection, the written statement of one of the Commonwealth's witnesses in which the witness had stated that Evans, while telling him of his plan to escape, also told him that "he'd killed a couple of people." (A. 4a-5a). Thus, the prosecutor clearly was not arguing that Evans had, in fact, killed other people, but only that his statement to the witness was evidence of Evans' motive for attempting to escape.

Counsel's decision was eminently reasonable. Counsel had objected at length, when the evidence was admitted, to any evidence of other crimes committed by Evans. (A. 2a-3a). At one point the attorneys even moved for a mistrial. (A. 3a). All of their objections were overruled, but the trial court instructed the jury that such evidence was limited to the issue of Evans' intent. (App. 23a). In this factual context, counsel, who unlike Evans' present attorneys, were present and heard the prosecutor's argument, reasonably interpreted that argument as comment upon adverse evidence which had been admitted over their objection.

Under these circumstances, the Virginia courts correctly declined to second-guess counsel's strategic decision. *See Strickland*, 466 U.S. at 689. *See also United States v. Murzyn*, 631 F.2d 525, 534 n.15 (7th Cir. 1980) (counsel performs effectively if, out of a desire to downplay adverse evidence, counsel decides not to object to argument or request limiting instruction), *cert. denied*, 450 U.S. 923 (1981).

Counsel's desire not to highlight the prosecutor's argument is closely related to Evans' failure to demonstrate the prejudice required to sustain a claim of ineffective counsel. The state habeas judge found that the "net result" of an objection by counsel "would necessarily have been to have increased the jury's awareness of [the adverse] evidence." (App. 13a). In view of the trial court's earlier rulings on the admissibility of that evidence, and the affirmance of those rulings by the Virginia Supreme Court on appeal (App. 19a-23a), there is no reasonable probability that the outcome of the guilt stage of Evans' trial would have been any different if counsel had voiced another objection or requested another limiting instruction. *See Strickland*, 466 U.S. at 694. This conclusion is further buttressed by the fact that the Commonwealth presented overwhelming independent evidence on the issue of premeditation. (App. 19a-22a). *See also Adams v. Wainwright*,

709 F.2d 1443, 1446 (11th Cir. 1983) (no prejudice even where counsel "probably should have objected"), *cert. denied*, 104 S.Ct. 745 (1984).

Thus, Evans has failed to sustain his burden of meeting both prongs of the *Strickland* test. As the state courts concluded (App. 10a), counsel's performance was well within the range of effective assistance, and Evans suffered no prejudice as the result of trial counsel's alleged error.[7]

III. The Use Of A Transcript At Petitioner's Resentencing Proceeding Did Not Violate His Rights Under The Confrontation Clause In View Of The Undisputed Fact That He Failed To Raise Such A Claim In The State Trial Court.

Evans concedes that he failed to raise his Confrontation Clause claim in the state trial court and on direct appeal, and that he raised it for the first time in his state habeas proceedings more than a year after his resentencing. (Ptn. 11 n.12). As this Court has recognized, such a failure clearly constitutes a procedural default under Virginia law. *See Smith v. Murray*, ___U.S. ___, 106 S.Ct. 2661, 2665 (1986), *citing Coppola v. Warden*, 222 Va. 369, 282 S.E.2d 10 (1981), and *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974).

When petitioner raised this claim in his state habeas proceedings, the Commonwealth asserted that the claim

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[7] Evans suggests that one reason why this Court should grant the writ on this claim is because the Virginia Supreme Court allegedly failed to review the state habeas judge's ruling. (Ptn. 23). Again, petitioner misapprehends Virginia law. The Supreme Court of Virginia's refusal of a petition for appeal based upon a finding of "no reversible error" (App. 16a) has but one meaning, *i.e.*, the Court has found the petitioner's case lacking in merit. *Saunders v. Reynolds*, 214 Va. 697, 700, 204 S.E.2d 421, 424 (1974). *See Jackson v. Virginia*, 443 U.S. 307, 311 n.4 (1979).

had been defaulted, and responded, alternatively, on the merits of the claim. (App. 98a). The habeas trial court denied the claim "for the reasons stated in the respondent's answer." (App. 1a). The Commonwealth responded in the same manner to Evans' subsequent petition for appeal to the Virginia Supreme Court. (App. 100a-102a). The Supreme Court affirmed the denial of habeas relief, finding "no reversible error in the judgment complained of." (App. 16a).

In *Smith v. Murray*, as well as in *Murray v. Carrier*, ___U.S. ___, 106 S.Ct. 2639, 2647 (1986), this Court recognized that Virginia's procedural default rules are both legitimate and reasonable. *See Smith*, 106 S.Ct. at 2665. In *Smith*, as in this case, the Virginia Supreme Court "declined" to accept the habeas petitioner's appeal without expressing the reasons for the Court's action. *Id.* Nevertheless, this Court had no difficulty concluding that the Virginia courts had enforced the State's procedural default rules. *Id.*

In the case at bar, the state habeas judge, as well as the Virginia Supreme Court, clearly dismissed this claim primarily for the procedural default, and only alternatively on the merits. (App. 1a, 98a). Thus, Evans' claim that his confrontation claim is not barred because it is allegedly "impossible to tell" whether the state courts enforced the procedural default (Ptn. 13-14 n.14), is without merit. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (court will not exercise jurisdiction if state decision "is alternatively based on bona fide separate, adequate, and independent grounds"); *Davis v. Allsbrooks*, 778 F.2d 168, 175-176 (4th Cir. 1985) (if state courts dismiss on procedural grounds, and alternatively on the merits, federal review is nevertheless barred).

If a petitioner fails to observe reasonable state procedural requirements, this Court will decline to exercise jurisdiction regardless of whether the highest state court

expressly refuses to consider the federal question, *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-463 (1936), or whether the state's highest court is completely silent on the matter, *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309-310 (1903). This Court will assume, in the latter case, that the silence is due to the procedural defect. *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945). *See also Stembridge v. Georgia*, 343 U.S. 541, 547-548 (1952) (Court declined to exercise jurisdiction even when existence of an adequate state procedural ground is "debatable").

Evans' procedural default is particularly inexcusable in this case because he specifically claims that he was "denied" the opportunity to confront and cross-examine adverse witnesses. (Ptn. 26, 27 n.28). Having conceded that he failed to raise this claim in the state courts (Ptn. 11 n.12), it is difficult to understand how he was "denied" his rights under the Confrontation Clause. To the contrary, the record demonstrates that although they may have differed concerning the exact manner in which the transcript would be utilized, the defense[8] and the prosecution had agreed that the transcript would be used in lieu of certain witnesses. (A. 8a).

Petitioner's claim that, despite his approval at trial, the transcript could not have been properly used in the absence of a showing that the witnesses were unavailable (Ptn. 26), is without merit. Not only did Evans fail to object to the use of the transcript, the record also shows that the defense made no effort to compel the presence of the missing witnesses. *See* Va. Code § 19.2 269.1. (A. 1a). Evans could have sought to cross-examine such witnesses under the "adverse witness" rule. *See* Va. Code §

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[8] It is most significant that Evans has never alleged that the attorneys who represented him at his resentencing proceedings and on the subsequent direct appeal, and who failed to object to the use of the transcript, were ineffective in this, or any other, respect.

8.01-401A. (A. 1a). This Court has found that under similar circumstances, where the defense clearly did not desire that the witnesses be present, an "unavailability" rule would make little, if any, sense, and is not constitutionally required. *United States v. Inadi*, ___U.S. ___, 106 S.Ct. 1121, 1127-1129 (1986).

Finally, since petitioner had the opportunity to confront and cross-examine the witnesses in question when they testified at his original trial, the transcript was sufficiently reliable to pass muster under the Confrontation Clause. *See Ohio v. Roberts*, 448 U.S. 56, 72-73 (1980) (specifically noting that it does not matter that the defendant was represented by different counsel at the prior proceeding).[9]

IV. Petitioner's Claim Concerning Recusal Of The State Habeas Judge Does Not Present A Substantial Federal Question.

Evans filed a motion to recuse the judge who presided over the state habeas corpus proceedings. The basis for the motion was the fact that one of his original trial counsel, whose effectiveness was the subject of the evidentiary hearing, was a former deputy clerk of the Alexandria Circuit Court[10] who during his tenure had

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[9] Evans' assertion that this Court should grant certiorari on this claim to resolve an alleged "conflict" between the decisions of the Virginia Supreme Court and a lone decision of the Court of Appeals of Maryland (Ptn. 27-28) is, at best, strained. *See* U.S. Sup.Ct.R. 17.1. Furthermore, *Tichnell v. State*, 427 A.2d 991 (Md. 1981), is readily distinguishable from Evans' case because Tichnell, unlike Evans, "vociferously" objected to the use of a transcript at his resentencing proceeding. 427 A.2d at 993.

[10] Contrary to petitioner's assertion (Ptn. 29), the attorney in question was *not* "a former long-time employee" of the state habeas judge. Nor was the attorney, as suggested by Evans (Ptn. 29 n.30), anything akin to the judge's "former law clerk." Under Virginia law, the clerk of a circuit court is a constitutional officer entirely independent of the judiciary. Va. Const. Art. VII, § 4. (A. 1a). Thus, the attorney in question,

frequently worked in the courtroom at trials presided over by Judge Kent, the state habeas judge. Evans contends that Judge Kent's refusal to recuse himself from the habeas proceedings constituted a denial of due process. (Ptn. 28).

Petitioner's claim fails to present a substantial federal question. In *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), this Court recognized that not all matters of judicial qualification are of constitutional magnitude, and that matters concerning a judge's "personal bias" are generally within the discretion of the state legislatures. More recently, in *Aetna Life Insurance Co. v. Lavoie*, ___U.S. ___, 106 S.Ct. 1580, 1585 (1986), this Court held that the Due Process Clause requires judicial disqualification on grounds of bias "only in the most extreme of cases." *See also* 106 S.Ct. at 1589 ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications.").

The matter of Judge Kent's alleged "personal bias" was, at most, a matter of state law. The evidence presented by Evans in support of his recusal motion (App. 105a-111a), certainly did not rise to the level of a constitutional violation. *See Lavoie*, 106 S.Ct. at 1585. The Virginia Supreme Court affirmed the denial of habeas relief on this claim (App. 16a), thus finding that, under state law, Judge Kent properly declined to recuse himself. Because no substantial federal question is presented by Evans' claim, this Court is without jurisdiction to grant certiorari. *See* 28 U.S.C. § 1257(3).

CONCLUSION

By petitioner's own admission, this case involves an "extraordinary confluence of events." (Ptn. 3). For that reason, the precise issues raised by this case are unlikely

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who had been a "deputy clerk" for the Circuit Court of the City of Alexandria (App. 106a), was a former employee of an independent constitutional officer, not a former employee of the judge.

to recur. The case will have little, if any, impact beyond the limitations of its own unique facts. There do not exist any special reasons or circumstances for reviewing the decision in this case, and no new constitutional rule would be developed by any decision of this Court.

Furthermore, three of the four claims which petitioner has presented are especially inappropriate for review by certiorari. One claim has been procedurally defaulted (claim III), another fails to raise a substantial federal question (claim IV), and a third, while it raises a federal question, is premised upon a fundamental misapprehension of Virginia law (claim I). The only remaining claim is the allegation of ineffective counsel at the guilt stage of Evans' trial (claim II). Aside from the fact that the state courts have determined that counsel made a tactical decision not to object to the prosecutor's argument and that the net effect of such an objection would have been to highlight adverse evidence, Evans has failed to demonstrate any "special or important" reason why this claim should be reviewed on certiorari. *See* U.S. Sup.Ct.R. 17.1 For these reasons, the petition should be denied.

Respectfully submitted,

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Attorney General of Virginia

*DONALD R. CURRY
Senior Assistant Attorney General

**Counsel of Record*

May 22, 1987

APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

Va.Const. Art. VII, § 4 (in relevant part)

County and city officers.—There shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue. The duties and compensation of such officers shall be prescribed by general law or special act.

* * *

Va. Code § 8.01-401 (in relevant part)

How adverse party may be examined; effect of refusal to testify.—A. A party called to testify for another, having an adverse interest, may be examined by such other party according to the rules applicable to cross-examination.

* * *

Va. Code § 19.2-269.1

Convicts, etc., as witnesses.—Whenever the Commonwealth or a defendant in a criminal prosecution in any circuit court in this State shall require as a witness in his behalf, a convict or prisoner in a correctional or penal institution as defined in § 53.1-1, the court, on the application of such defendant or his attorney, or the attorney for the Commonwealth, shall issue an order to the Director of the Department of Corrections to deliver such witness to the sheriff of the county, or sergeant of the city, as the case may be, who shall go where such witness may then be and carry him to the court to testify as such witness, and after he shall have so testified and been released as such witness, carry him back to the place whence he came, for all of which service such officers shall be paid out of the criminal expense funds in the state treasury such compensation as the court in which the case is pending may certify to be reasonable.

TRIAL TRANSCRIPT PAGES 297-300 (excerpts)

Mr. KLOCH: * * *

The next Commonwealth witness will be an individual by the name of Ralph Washington, and at the time this occurred, he was an inmate in the Alexandria Jail and shared a cell with the defendant.

Among other things, he will testify that the defendant told him he was up here purely to escape. He was facing a life sentence on a murder charge in Carolina. He had nothing to lose and would waste anyone that stood in his way. That is essentially the testimony that Mr. Washington would give and it is my position that under Kirkpatrick and other cases that is admissible as to motive and intent. I think either as to motive or intent that would be admissible.

MR. LONG: Well, first of all, Your Honor, I don't know that motive has anything to do with the offense of escape. I always thought, and maybe I'm wrong, but I've been taught motive comes into play where circumstantial evidence is concerned and that is not the situation.

Secondly, we have a statement from the Commonwealth Attorney, a statement that Mr. Washington made, and for the life of me I can read it upside down, inside out, sideways and every other way and I don't see a word about wasting anybody. I don't see a word about being in jail or two life sentences. If this witness gave a statement on the 3rd of February, which is seven days after the occurrence, and now comes into court and says he's going to testify about wasting people in an attempt to get away, I think his testimony is a little difficult to understand.

What I'm saying, regarding prior offenses that have not resulted in a trial, unless there is a conviction involved, they are not admissible. That would do nothing but instill prejudice in the minds of the jury. We're only trying one issue, the willful, deliberate killing and escape. Whether

he told seventy-five other people has really nothing to do with it other than to inflame the jury.

Secondly, we have no objection to the man testifying that he came up to escape, and, obviously, that's a critical part, whether he had information on the attempt to escape, but as far as killing people and awaiting a life sentence, that is not the fact. The record is to the contrary. The Commonwealth Attorney knows that. He's under an indictment in North Carolina. He's not been tried for anything. He does not stand convicted and has not received a life sentence. If that evidence comes in that Mr. Kloch proffered to the Court—and I don't know what Kirkpatrick says—but if the Court allows that in, it's going to merely be for the purpose of inflaming the jury against this defendant and we would immediately move for a mistrial. It has nothing to do with this case or the issues in this case.

* * *

THE COURT: Gentlemen, the Court is of the opinion that the evidence is admissible to show the intent or state of mind of the defendant. The objection will be overruled.

The evidence will not be admitted to show whether or not the defendant had committed other crimes in North Carolina, but merely to show his state of mind or intention when making this statement.

I will give the jury a cautionary instruction as to the weight it will be given without waiving your objection to admissibility.

MR. LONG: Your Honor is not only waiving the objection to admissibility, but you might on the record also if it comes in—the Court should consider a motion for a mistrial.

THE COURT: That motion will be denied.

TRIAL TRANSCRIPT PAGES 352-353 (excerpts)

MR. LONG: This is the excised portion; this is the original.

During the luncheon break, I had an opportunity to read Jones on Evidence and the Kirkpatrick Case, and I reiterate my argument as far as the second paragraph. That's where he said he killed a couple of people.

I will state, Your Honor, in accordance with Kirkpatrick, as well as other case law, it has absolutely no probative value at all. I ask that be excised, also; then I understand the Court's ruling on it. I think for the record I have to put that in.

MR. KLOCH: The witness didn't say anything about the other case or killing or anything of that nature and I think the statement should not be admitted at all or admitted for what it is. By his own statement, he didn't say exactly that, but he paraphrased it.

THE COURT: To be consistent on my ruling on direct examination of the witness during which the witness testified the defendant said he faced a life sentence in North Carolina or two life sentences, I have to permit this to go in. Accordingly, I'm satisfied that the ruling was correct.

MR. LONG: I understand that. I'm saying for the record I'm putting this in.

THE COURT: All right. Your objection is noted.

• • •

THE COURT: I stated to you Defendant's Exhibit A had been admitted and explained to you the purpose for which it was admitted. I erred in that it should be A1 rather than A. A is not admitted.

EXHIBIT A-1

Statement of
Ralph Barney Washington

Page ___of ___Pages 2/3/81
Statement taken by J. N. Soos 0916 Hrs

On January 26, 1981, I was housed in Cellblock 3-C at the Alexandria Correctional Center. A guy named Evans was put in the block with me and three other inmates named Miller, Lawrence and Jasper. During the time Evans was in my block, he talked about his adventures. He said he'd killed a couple of people. Evans also talked about trying to escape. He said he had come up from North Carolina as a witness, but was going to go into court and say he didn't know anyone. He asked if he could get away in court. He asked if the deputies wore guns and which way he should go if he got free on foot. He also said if he got away, he would probably try to grab someone in a car to make them drive him away.

Jasper was the only one who tried to give Evans any information and that was to run towards the river or into an apartment complex to get away.

X [signed Ralph B. Washington]

Witness [signed Joseph N. Soos]

TRIAL TRANSCRIPT PAGES 581-582 (excerpts)

THE COURT: I'm satisfied that when you read the two together along with the certification of the Superior Court and the judge of the 10th Judicial District the indictment is the indictment that corresponds with the judgment and the commitment. The objection is overruled.

MR. LONG: If I may state for the record, not only are they not referred to by number, but circumstantially it is not proper argument; but the documents speak for themselves.

THE COURT: I agree with that. You have to read them, and whatever appears on the face of them, as well as what appears on the certification.

MR. LONG: For the purposes of the record, I make that objection, but I think that when you're dealing with something as critical as the defendant's prior record and it's going one way or the other whether he receives life or death, that the Commonwealth has got to do more than what they've done here. They could have been numbered; they must be numbered. The file must be numbered. You just can't pull it out from nowhere. There are no numbers for the record and no connection as to the two other than the fact they are stapled together.

THE COURT: Except for the certification of the clerk which states the foregoing and a copy of the indictment, the warrant and the judgment and the commitment and it makes reference to 96.8. The clerk has certified this is the indictment that corresponds with 96.8.

Given that certification, notwithstanding the fact that the indictment does not have a number on it, I'm satisfied as to its admissibility.

MR. LONG: I object to it.

THE COURT: All right, sir.

Make that the next number if you will, please.

THE CLERK: Twenty one.

THE COURT: All right.

(The document previously referred to was marked Commonwealth's Exhibit No. 21 for identification.)

RESENTENCING TRANSCRIPT PAGES 210-211 (excerpts)

MR. HOWARD: Your Honor, one matter if I may. I anticipate the Commonwealth starting off by reading the transcripts of the prior trial. My only thought, Mr. Myers and I have discussed this last night. With those individuals of course that are going to read their own parts, I think that's absolutely the proper way to do it. If the Commonwealth intends to have someone read parts like Mr. Washington, Mr. Boone, Mr. Jasper, there was another Oliver Turner and the defendant, I think one individual should read every one of those parts rather than have separate individuals read separate parts.

It seems to me and my points are well taken, it's obvious if we have five or six very credible, intelligent, and nice people that that would be a problem for the defense. If one person read everybody's part, then I guess that's only the fair way to do it. It seems to me that it can be done.

THE COURT: Any objection to that?

MR. KLOCH: I guess if that had been arranged sometime ago. I talked to Mr. Howard probably months ago and we decided to put in various people for each person. It's been at least six weeks ago.

* * *

No. 86-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of Alexandria, Virginia

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PETITIONER'S REPLY BRIEF

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June 5, 1987

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1754

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of Alexandria, Virginia [1]

PETITIONER'S REPLY BRIEF

I. EVANS' COUNSEL PROVIDED INEFFECTIVE ASSISTANCE ON APPEAL BY FAILING TO DISCOVER THAT EVANS' DEATH SENTENCE WAS BASED ON FALSE AND UNCONSTITUTIONAL EVIDENCE.

As respondent long ago admitted and petitioner has demonstrated (*see* Ptn. at 16-20), Evans was sentenced to death on the basis of evidence that the Commonwealth's prosecutor knew was false and inadmissible.

[1] Respondent's unsupported assertion (Respondent's Brief in Opposition at 1 n.1 ("Opp.")) that this Court "has no jurisdiction . . . to review the decision of a state trial court" was long ago rejected by this Court. *See Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 221-22 (1926). *See also United States v. Richmond*, 177 F. Supp. 504, 506-07 (D. Conn. 1959), *aff'd*, 279 F.2d 170, 172 (2d Cir. 1960). *Cf. Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954) (reviewing decision of intermediate state court when highest state court had summarily rejected petitioner's writ of error). If the Virginia Supreme Court's cryptic refusal to hear Evans' petition for appeal (App. 16a) is a decision on the merits, as respondent urges (Opp. at 10 n.7), then this Court of course has jurisdiction. Respondent does not contend otherwise.

Thus, the issue raised by the instant petition is not whether Evans was wrongly sentenced to death—the Commonwealth admits that he was—but whether Evans' court-appointed counsel were ineffective in failing to discover the Commonwealth's wrongdoing at a time when Virginia law barred capital resentencing. Acknowledging that appellate counsel's performance should be judged by the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), respondent claims that Evans' counsel provided adequate representation both because the ten-month period of the direct appeal was too short for counsel to have discovered the Commonwealth's misconduct, and because in any event Evans ultimately received a second sentencing hearing, which "wiped the slate clean" of prejudice. (Opp. at 4-8). Both arguments are baseless.

In a case already characterized by shocking prosecutorial misconduct, respondent defends Evans' counsel's performance by blatant misstatement of the record facts. Contrary to respondent's contention, Evans' court-appointed counsel did not need "to go outside the trial record" to discover that Evans' death sentence was invalid. (Opp. at 7). The Commonwealth's *own prosecutor* has stated under oath that he informed Evans' defense counsel on the day of the sentencing hearing (April 17, 1981) that the Commonwealth's evidence was false. (App. 64a-72a; *see* Ptn. at 8, 17-18). Regardless of whether one credits that dubious and self-serving testimony, the trial record included clear, written documents that should have alerted Evans' counsel to the errors in the Commonwealth's evidence. On June 1, 1981—after Evans' conviction and prior to his appeal—counsel received, and claims to have read (*see* App. 62a), the Commonwealth's pre-sentence report. (App. 57a-60a). That report unmistakably showed that the most damaging "evidence" introduced by the Commonwealth at Evans' sentencing hearing was in fact false. (App. 58a; *see* Ptn. at 7, 19-20). No reasonably competent counsel who read the pre-sentence report—which was part of

the record throughout the ten months (from June 1, 1981 to March 22, 1982) that counsel represented Evans on appeal—could have failed to object on that basis to Evans' death sentence.

In a similar vein, respondent's suggestion that the flaws in Evans' death sentence were so obscure that "it took Evans' habeas counsel approximately one year" to discover and prove them (Opp. at 7) is an egregious misstatement of fact. As respondent well knows, habeas counsel began representing Evans in April 1982—shortly after this Court had denied Evans' first certiorari petition. Counsel immediately filed a habeas corpus petition (to stay Evans' execution), and within days thereafter discovered the errors in Evans' death sentence. One month later, in May 1982, habeas counsel filed an amended petition for a writ of habeas corpus specifically alleging that the conviction records (Commonwealth Exhibits 19-21) introduced by the prosecution at Evans' trial were false. *See Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114, 117 (1984), *cert. denied*, 471 U.S. 1025 (1985) (*"Evans II"*) (App. 34a). Moreover, on July 6, 1982—within three months of commencing the representation—habeas counsel filed a Bill of Particulars which specified eight separate flaws in Commonwealth Exhibits 19-21. (*See* Supp. App. at 113a).[2] That the Commonwealth's Assistant Attorney General Jerry Slonaker delayed nine more months before confessing error—while he and his colleagues from the Commonwealth Attorney General's office personally lobbied the Virginia legislature to pass emergency amendments to the death penalty statute which would permit capital resentencing (Supp. App. 115a-117a)—has no bearing on whether competent "appellate counsel could

[2] The Supplemental Appendix ("Supp. App.") is attached to this Reply Brief and is paginated to follow the Appendix already filed by Evans. The Commonwealth's recitation of the history of Evans' habeas corpus petition (Opp. at 7 n.5) studiously fails to mention either Evans' first amended petition of May 1982, or Evans' July 1982 Bill of Particulars.

have discovered and demonstrated the errors in the conviction records" (Opp. at 7) during the ten-month period when the case was on direct appeal.[3]

In sum, from the day the pre-sentence report was filed (June 1, 1981) through the denial of Evans' certiorari petition (March 22, 1982), the record available to appellate counsel unmistakably indicated that Evans had been sentenced to death on the basis of false evidence. Counsel's failure to discover or raise these obvious flaws on appeal fell far below the standard of conduct required by this Court in *Strickland* and *Evitts v. Lucey*, 469 U.S. 387 (1985).

Respondent's further contention that Evans suffered no prejudice from counsel's failure both defies common sense and rests on a misstatement of the law. It cannot seriously be disputed that if appellate counsel had proved, or the Commonwealth had conceded, the flaws in Commonwealth Exhibits 19-21 at any time prior to March 28, 1983—when, at the behest of Mr. Slonaker, the Commonwealth passed emergency legislation to permit capital resentencing proceedings—Evans' death sentence would automatically have been commuted to life imprisonment. *See Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). Contrary to the Common-

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[3] The Commonwealth is also wrong in suggesting that the errors in Commonwealth Exhibits 19-21 were made "unbeknownst to the prosecution." (Opp. at 7 n.5, citing App. 48a). Although the Commonwealth's April 12, 1983 letter to the court confessing error (App. 48a) made that assertion, it was proved false by the subsequent testimony of the Commonwealth's chief prosecutor, John Kloch, who admitted that he knew in April 1981 that Commonwealth Exhibits 19-21 were flawed. *See Evans II*, 323 S.E.2d at 120 (App. 39a-40a; *see also* Ptn. at 8; App. 64a-72a). Moreover, in the September 1983 hearing, the author of the letter confessing error, Assistant Attorney General Slonaker, admitted that as early as January 1983—three months before he wrote the letter—he knew both that Commonwealth Exhibits 19-21 were false, and that Mr. Kloch was aware of their falsity when Kloch introduced them at the April 1981 trial. (Supp. App. 117a-119a). Thus, Slonaker's letter to the court confessing error was itself false.

wealth's contention (Opp. at 5-6 & n.3), nothing in *Evans II* even remotely suggests that the Virginia Supreme Court determined, as a matter of state law, "that *Patterson* would not have been applicable to [Evans'] case if his original death sentence had been vacated on direct appeal . . . ." (Opp. at 6). To the contrary, in *Evans II* the court held that as a matter of *federal* law the *ex post facto* clause of the United States Constitution did not preclude resentencing under Virginia's revised death penalty. *Evans II*, 323 S.E.2d at 118-19 (App. 35a-38a); *see id.*, 471 U.S. 1025, 1027 n.2 (Marshall, J., dissenting from denial of certiorari).[4] If Evans' counsel had acted competently during the course of the first appeal, there would have been no occasion to reach that issue, since a second death sentence would have been barred by existing state law. Counsel's failure to discover or challenge the flaws in Evans' death sentence, even in the face of a pre-sentence report which expressly demonstrated the falsity of the Commonwealth's evidence, caused lasting prejudice to Evans. (*See* Ptn. at 20).

II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN AT THE GUILT STAGE OF HIS TRIAL HIS COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S FALSE AND HIGHLY PREJUDICIAL SUMMATION.

As already demonstrated (Ptn. at 21-24), petitioner was denied the effective assistance of counsel at the guilt phase of his trial when his counsel took no action to rebut the prosecution's false suggestion that Evans was a multiple murderer. Ignoring every decision of this Court and of the Virginia Supreme Court concerning prosecutorial misstatements cited by Evans (*see* Ptn. at

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[4] Respondent's selective quotation (Opp. at 5 n.3) from the Virginia Supreme Court's opinion in *Evans II* omits by ellipsis critical language from the opinion which flatly contradicts respondent's interpretation of that case. *Compare* Opp. at 5 n.3 (respondent's excerpted version of *Evans II*) *with* App. 36a (actual opinion of the Virginia Supreme Court).

23-24 & n.25), respondent contends that "[t]he prosecution did not argue . . . that Evans had, in fact, killed other people." (Opp. at 8 n.6). That contention is flatly at odds with the actual language used by the prosecutor, who stated: "Two witnesses said [Evans] had nothing to lose; *he'd killed people in North Carolina . . . . He told people he killed people* and was facing life imprisonment in North Carolina." (App. 56a (emphasis added); *see* Ptn. at 6 n.4). Regardless of whether the prosecutor intended to "couch[]" his argument "in terms of comments upon evidence of Evans' 'motive,'" as respondent contends (Opp. at 8 n.6), the prosecutor falsely stated that Evans either was, or had admitted to being, a multiple murderer.

Likewise, respondent is wrong in suggesting that the prosecutor's remarks were merely "comment[s] upon adverse evidence which had been admitted over [Evans'] objection." (Opp. at 9). There was no such evidence, and none is cited in either respondent's Brief or the opinion below. The only testimony even remotely relevant that was offered by the prosecution, over objection, came from two inmate witnesses, Ralph Washington and Anthony Jasper. They testified about oral statements allegedly made by Evans on the night before the shooting. *But neither witness said a word about Evans' having "killed people in North Carolina."* (*See* App. 56a).[5]

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[5] Reaching beyond anything suggested in the habeas court below, the Commonwealth now claims that the prosecutor's summation referred to Defendant's Trial Exhibit A-1 (Opp. at 5a), which is a pre-trial written statement given to the police by inmate Washington. But clearly the prosecutor was not referring to that Exhibit, since it was made by only *one* witness, not two; and was sponsored by the *defendant*, without objection from the prosecution, for the limited purpose of impeaching Washington's assertion at trial that Evans had said he would kill anyone who prevented his escape. Moreover, the trial court carefully instructed the jury that the entire Exhibit was admitted "not to prove the truth of the statements contained in [it], but rather to prove that *this witness* [*Washington, not Evans*] made the statement [*i.e.*, Defend-

In short, there was no evidence before the jury that Evans had either previously killed anyone (for in fact, he had not), or had said that he had done so. The prosecutor's deliberate, repeated misstatement about this crucial matter contravened the trial court's earlier instructions and denied Evans the right to a fair trial. (*See* Ptn. at 23-24 and cases cited therein). No "strategic decision" (*see* Opp. at 9) by counsel could possibly justify the failure either to object to the misstatement or to request a curative instruction.

III. EVANS' CHALLENGE TO THE UNCONSTITUTIONAL USE OF PRIOR TRANSCRIPT AT HIS RESENTENCING PROCEEDING IS NOT BARRED BY PROCEDURAL DEFAULT.

Respondent does not seriously dispute that Virginia's longstanding practice of permitting the prosecution to introduce the prior transcript testimony of adverse witnesses at capital resentencing proceedings violates the decisions of this Court and conflicts with the decision of at least one other state court. (*See* Ptn. at 24-28; Opp. at 12-13).[6] Rather than argue the merits of Virginia's

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ant's Exhibit A-1] on the occasion in question." (Supp. App. 120a) (emphasis added).

In the evidentiary hearing below respondent never contended that the prosecutor's summation referred to Defendant's Exhibit A-1. Moreover, the habeas trial judge found that the summation referred to the "live testimony" of Washington and Jasper that "had been objected to by defense counsel at the time of its introduction, but to no avail." (App. 12a-13a). Respondent first proffered the theory that the prosecutor was referring to the defendant's own Trial Exhibit A-1 when resisting Evans' petition for review before the Virginia Supreme Court.

[6] Respondent's sole contention on the merits is that under *Ohio v. Roberts*, 448 U.S. 56 (1980), the Confrontation Clause is not offended where a defendant "had the opportunity to confront and cross-examine the witnesses in question when they testified at his original trial." (Opp. at 13). In *Roberts*, of course, the prosecution demonstrated that the witness was in fact unavailable—unlike here. The Court stated, however, that "[i]n the usual case (*including cases where prior cross-examination has occurred*), the prosecution

flawed procedure,[7] respondent contends that this Court is barred from reviewing the matter by the doctrine of procedural default. (Opp. at 10-12). That argument rests on a tortured misreading of the decision below.

No amount of *ipse dixit* can transform the state habeas judge's dismissal of the claims in Evans' petition " 'for the reasons stated in the respondent's answer' " into, as respondent claims, a "clear dismiss[al]" of Evans' Confrontation Clause claim "primarily for the procedural default, and only alternatively on the merits." (Opp. at 11). Not only is it not "clear" that the dismissal of this claim was "primarily" for procedural reasons, it is not clear that the dismissal rested on procedural grounds *at all*.[8]

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must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." *Id.*, 448 U.S. at 65 (emphasis added). Respondent's reliance (Opp. at 13) on *United States v. Inadi*, 106 S. Ct. 1121 (1986), is similarly misplaced. While refusing to adopt the "radical proposition" that *Roberts* be applied to "co-conspirators' out-of-court statements," *id.* at 1126, the Court in *Inadi* reaffirmed the *Roberts* rule, stating: "[W]hen the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial[,] . . . before such statements can be admitted the government must demonstrate that the declarant is unavailable." *Id.* at 1125.

[7] Respondent's suggestion that Evans' habeas counsel "clearly did not desire that the witnesses be present" (Opp. at 13) is both unsupported and untrue. At the resentencing proceeding counsel was well aware that settled Virginia law authorized the prosecution to introduce prior transcript testimony without compelling the live appearance of the witnesses. The trial judge had made clear that he would permit no challenge even to portions of the transcript testimony (*see* Ptn. at 11 n.12; App. 95a); objecting to the use of the entire transcript would have been an exercise in futility that the trial judge would undoubtedly have regarded as frivolous. Respondent's suggestion (Opp. at 12-13) that Virginia state law permits defendants to compel the presence of adverse inmate witnesses is beside the point; the decisions of this Court establish that in this case the prosecution had the burden of compelling their appearance. *See* note 6, *supra*.

[8] The habeas judge's one-sentence ruling dismissed more than a dozen separate claims by petitioner. Carried to its logical conclu-

At best, respondent can show only a possibility that the "ambiguous [and] obscure" determination of Evans' confrontation claim by the state court, *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983), in fact rested on procedural grounds. But as this Court has held, to close the door to federal review "the state court must *actually* have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985), citing *Ulster County Court v. Allen*, 442 U.S. 140, 152-54 (1979) (emphasis added). And to show such reliance Judge Kent's ruling would have had to contain what is *not* present here: "[a] clear or express indication that 'separate, adequate, and independent' state-law grounds were the basis for the court['s] judgment." *Caldwell*, 472 U.S. at 327, quoting *Michigan v. Long*, 463 U.S. at 1041. Under these decisions, which respondent does not even discuss, there is no procedural bar to review of Evans' Confrontation Clause claim.

IV. EVANS' CLAIM CONCERNING THE LIKELIHOOD OF BIAS BY THE HABEAS JUDGE RAISES A SUBSTANTIAL FEDERAL ISSUE UNDER THE DUE PROCESS CLAUSE.

As Evans has already demonstrated (Ptn. at 28-30), the state habeas judge had a longstanding professional and personal relationship with Evans' trial counsel, Mr. Brown, whose professional competence and veracity were the central issues in the proceeding below. Under these circumstances, it was unlikely that Judge Kent could be a "neutral and detached" decisionmaker, as the Due Process Clause of the United States Constitution requires. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

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sion, respondent's argument would suggest that the habeas judge dismissed each of these claims for each and every reason stated in respondent's Answer. Fairly read, Judge Kent's ruling means only that in his view the Answer contained sufficient arguments or "reasons" to warrant dismissal of the various claims in Evans' petition; the ruling does not state *which* of those reasons Judge Kent actually relied on.

Apart from a hypertechnical discussion of the details of Mr. Brown's employment status,[9] respondent's principal contention is that questions concerning the alleged bias of a state habeas judge are "at most, a matter of state law" which this Court is "without jurisdiction" to review. (Opp. at 14). That contention is foreclosed not only by the decisions of this Court cited in the Petition (which respondent fails even to mention), but also by *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580 (1986), upon which respondent relies. Although the Court in *Aetna* stated that evidence of a judge's "general frustration with insurance companies" would not by itself bar him from hearing all cases in which such companies are a party, *id.* at 1585, it reversed on due process grounds a state Supreme Court ruling because one of the nine appellate judges had a potential financial interest in the outcome of the case. *Id.* at 1586-87. The Court held that recusal is required where sitting on the case " 'would offer a possible temptation . . . to the average [judge]' " to favor one party over the other. *Id.* at 1587 (citation omitted).

In the circumstances of this case, Judge Kent's long-standing professional and personal relationship with Mr. Brown would offer such a possible temptation " 'not to hold the balance nice, clear and true.' " *Aetna*, 106 S. Ct. at 1587 (citation omitted). That Evans' claim presents a substantial federal question is doubtless; the trial court's, and respondent's, inability to recognize it as such suggests that it is an important one as well.

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[9] Regardless of whether, as a matter of state law, Mr. Brown was a "constitutional officer entirely independent of the judiciary," as respondent contends (Opp. at 13 n.10), it is undisputed that for a period of three years Brown performed important judicial functions under the supervision and direction of Judge Kent. (*See* Ptn. at 14-15, 28-30). In this sense, Mr. Brown's employment status was no different than that of a law clerk to a federal judge. *See United States v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982) (Weinfeld, J.).

CONCLUSION

For the foregoing reasons, and those stated in the Petition, petitioner prays that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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June 5, 1987

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

EXCERPT FROM PETITIONER'S BILL OF PARTICULARS (FILED JULY 6, 1982)

The petitioner, Wilbert Lee Evans, sets forth the following particulars concerning the claims in his amended complaint:

1. "The specific evidence that was available for presentation at the sentencing phase of the trial which defense counsel did not present, and whether petitioner brought such evidence to the attention of his attorneys. (See allegation 17(a) of the amended petition).

ANSWER: The following evidence was available for presentation to the jury at the sentencing phase of petitioner's trial:

a. The testimony of the petitioner (then defendant), Wilbert Evans. Evans . . . would have testified about the nature of the previous offenses offered into evidence by the Commonwealth (see discussion below), and, in particular, that, in fact, he was not convicted of assaulting a police officer with a deadly weapon.

* * * *

h. A certified abstract of proceedings before the Superior Court for Lake County, North Carolina, indicating that petitioner was not convicted of assault on a police officer, and that in fact, the charge was nolle prossed. Had objection been made to introduction of this proported conviction, and had it been sustained, this document would not have been offered into evidence.

i. The testimony of the Clerk of Court of the Superior Court of Wake County, North Carolina, or his duly authorized representative. This official could have explained to the jury that:

1. The July, 1964 conviction for assault on a police officer with a deadly weapon had been nolle prossed upon appeal;

2. That the July, 1964 conviction for an affray with a deadly weapon was appealed, resulting in a trial de novo, thus making the conviction in the City Court of Raleigh a nullity;

3. That the "Commitment to State Prison" dated February 21, 1964, (part of Commonwealth's Exhibit 21) was for an offense reflected in another document presented to the jury, and was not for a separate conviction;

4. That the "Commitment to State Prison Department Prison Unit" form dated September 30, 1964, was for an offense reflected in another document presented to the jury, and was not for a separate conviction;

5. That the "Judgment and Commitment" form dated December 15, 1970 (part of Commonwealth's Exhibit 19) was for an offense reflected in another document presented to the jury, and was not for a separate conviction;

6. That the two, single column "Judgment" forms dated December 15, 1970 (part of Commonwealth's Exhibit 19) were for the same offense, and were for an offense reflected in another document presented to the jury, and were not for separate offenses;

7. That the "Judgment and Conviction" form dated July 12, 1972 (part of Commonwealth's Exhibit 20) was for an offense reflected in another document presented to the jury, and was not a separate offense;

8. That the "Indictment—Assault With Intent To Kill", undated, was the charging document for an eventual conviction for assault with a deadly weapon inflicting serious injuries, itself reflected in a second document dated September 27, 1972, received by the jury, and was not a separate offense.

All of the above information (a-i) was known to, should have been known to, or was brought to the attention of trial counsel by the petitioner and was available at the time of the sentencing hearing.

* * * *

EXCERPT FROM HEARING OF SEPTEMBER 21, 1983 (TESTIMONY OF JERRY P. SLONAKER):

[147] Whereupon,

JERRY P. SLONAKER,

was called as a witness by and on behalf of the Commonwealth of Virginia, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KLOCH:

Q Would you please state your full name and your occupation and how long you have been employed by the Attorney General's Office.

A Jerry P. Slonaker, Assistant Attorney General. I've been employed as an Assistant Attorney General, Criminal Division, since July of 1975.

Q And you were the Assistant that handled the direct [148] appeal and *habeas corpus* on the case we are dealing with today?

A That's correct.

Q Mr. Slonaker, I want to go over a couple of things that occurred during the pendency of this case, as well as what your involvement was in Senate Bill 12 [amending the Virginia death penalty statute to permit capital resentencing]. You're familiar with Senate Bill 12?

A Yes, I am.

Q Could you give the Court, please, a history in terms of your involvement, if any, in Senate Bill 12?

A Senate Bill 12 was essentially drafted a year before it was introduced. It was drafted by Jim Culp of our office. For reasons unknown to me, it was not introduced or, if it was introduced, it never got out of committee.

Q In the '82 session?

A That's correct.

Subsequently, not too long before the memorandum which I prepared on September 9th, [1982] the Deputy Attorney General in charge of the Criminal Division came to me and Jim Culp and indicated to us he was interested in having this bill introduced and he wanted Jim Culp and I to prepare a memorandum explaining the purpose of the bill and outlining the various reasons why it should be introduced.

[149] Q And was that done?

A It was done, that's correct.

Q All right.

And this was proposed as emergency legislation, was it not?

A That's right.

Q For what reason was that?

A Well, it had been a year since—really over a year since the Patterson case had been decided. All of us working in the *habeas* section felt that this was a problem that needed to be addressed. We were quite aware that in every capital murder case in Virginia there has been a major attack made collaterally with *habeas corpuses*, especially to the sentencing phase of the trial. This left the situation it allowed as to what an appropriate remedy was. The Patterson case was open to some interpretation, but it appeared to us to be a significant problem. . . .

* * * *

[150] Q How about after that, Mr. Slonaker, what involvement did you have in Senate Bill 12?

A I took the bill that Jim Culp had drafted, sat down with him. I think we made a few polishing changes to it, but it was essentially as he had drafted.

Q In 1981?

A '81.

I then worked with him to prepare the memorandum fro [sic] Don Geering, as per his request, to lay out why we felt legislation was needed and why it was needed as emergency legislation.

Q September 9th, 1982?

[151] A That's correct, right.

Q Okay.

After that particular memorandum, did you have any other input in Senate Bill 12?

A Yes, I did. Mr. Geering, as Deputy in charge of the Criminal Division, has primary responsibility on all legislation drafted by this division. He does, however, on all bills have some backup people, because occasionally he's required to be out of town and unavailable. So, he asked Jim Culp and I to be the backup for that bill.

Now, I had some further involvement if you want me to go into that.

Q All right.

A The bill was called before the Senate Court of Justice Committee. I think that was on January 19th. Jim Culp was going to testify before the Senate committee. He asked that I accompany him to the Senate committee so that I could—we could put our heads together if any question came up. He was to do the testimony. He did that. Subsequently, I was advised by the House to appear to testify. I did appear one date. The bill was not called. I had to go out of town and Jim Culp appeared, but I don't think he testified. I think the bill passed without any testimony [152] being given in the House.

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[162] THE COURT: You may examine.

CROSS-EXAMINATION

BY MR. LABOWITZ:

Q Mr. Slonaker, my name is Ken Labowitz.

When was the first time you became aware of, for lack of a better term, the C, D, and E problem in this case [concerning the erroneous convictions in Commonwealth

Exhibits 19-21], the two misdemeanors that became one misdemeanor resolution in the Circuit Court?

A When the *habeas corpus* petition was filed.

Q Does that mean the second one, in the spring of '82?

A I believe that's correct.

Q And the third *habeas corpus* in January of '83 then raised the separate issue of the uncounselled misdemeanors?

A That's right. Also, clarified some other allegations, one of them being a claim under *Estell* versus *Smith*, but yes, that's correct.

* * * *

[167] Q In the discussions that you had—Strike that. When did you first become aware the prosecutor's office, Commonwealth Attorney's Office in Alexandria had been aware prior to trial of the C, D, E problem?

[168] A The awareness was just what John Kloch testified to here today.

Q When you're saying awareness, it's kind of a loaded question. I mean your awareness.

A The way you asked the question, what I'm trying to say is I contacted John Kloch after the petition was filed. . . .

* * * *

A The petition was filed and I recall sending a copy of the petition to Mr. Brown, Mr. Long, and I think Mr. Kloch if he didn't already have a copy. I know I provided copies of all petitions, as they were filed, to Mr. Long, Mr. Brown, and Mr. Kloch.

Q And at that point something happened?

A I don't know the exact dates when I talked to John [Kloch]. I know I spoke to him on the telephone on a number of [16?] occasions. I met with him at his office on one or two occasions. I just don't recall the precise date.

Q And when was it you first became aware of the Commonwealth Attorney's Office, the collective knowl-

edge of the C, D, E error prior to—Let me rephrase all of that.

When did you become aware that Mr. Kloch and Mr. Sengel [assistant to Mr. Kloch] had been in possession of the C, D, E problem, knowledge of the C, D, E problem? As we've heard today, they said they told Mr. Long and Mr. Brown about that. When did you first become aware that Mr. Kloch and Mr. Sengel had that information at the time they said they had it?

A I'm not sure. I just don't recall.

Q Sometime prior to today?

A Certainly.

Q Sometime prior to January 1983?

A I would think so.

* * * *

EXCERPT FROM TRIAL TRANSCRIPT OF APRIL 16, 1981

(EXAMINATION OF COMMONWEALTH'S WITNESS RALPH WASHINGTON):

[327] THE COURT: Let me see the statement for a moment before he's excused [*i.e.*, Washington].

Ladies and gentlemen of the jury, the statement is marked as Exhibit Defendant's A and it's admitted not to prove the truth of the statements contained in the statement, but rather to prove that this witness made the statement on the occasion in question. The witness may be excused.

(Whereupon, at 11:50 a.m., the witness was excused.)

* * * *